

83-416

Office-Supreme Court, U.S.
FILED

SEP 13 1983

ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ELIZABETH Y. BYRUM et. al
Petitioners

v.

LOWE & GORDON, LTD.
Respondents

and

BARNEY L. BYRUM, et. al.
Petitioners

v.

GARY B. PATTERSON, LOWE & GORDON, LTD.
et. al.
Respondents

FROM APPEALS IN THE
SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

OF COUNSEL:

LAW OFFICES OF J. BENJAMIN DICK &
JOHN MICHAEL CASSELL
421 Park Street
Charlottesville, Virginia 22901

QUESTIONS PRESENTED

1.

Has the use of a State Statute and procedures resulted in decisions repugnant to the U.S. Constitution in violation of the Fourteenth Amendment.

2.

Does the Virginia Statute §8.01-329 violate the Fourteenth Amendment of the U.S. Constitution as to its use in the instant case and generally regarding adequate notice to satisfy the Fourteenth Amendment.

3.

Are the collective and combined processes and decisions of the State Courts repugnant to the U.S. Constitution by denying due process of law in violation of the Fourteenth Amendment.

LIST OF PARTIES

Pursuant to Rule 21.1(b) of the Supreme Court, counsel certifies that the following is a complete list of all parties to the proceedings below and additionally, all parties and persons believed to be interested in the outcome of this Petition:

Richard W. Arnold, Jr.

Counsel for Gary B. Patterson, Trustee, Respondent

Elizabeth Y. and Barney L. Byrum,
Plaintiffs

Bear Investment Company, Respondent

J. Benjamin Dick, Counsel for Plaintiffs

Lowe and Gordon, Ltd., Respondent

John C. Lowe, Esquire, Counsel for Lowe and Gordon,
Ltd.

Gary B. Patterson, Trustee, Respondent

W. W. Whitlock, Esquire

Counsel for Bear Investment Company, Respondent

SUBJECT INDEX

QUESTIONS PRESENTED	i.
LIST OF PARTIES	ii.
SUBJECT INDEX	iii.
LIST OF AUTHORITIES	iii-iv.
OPINION BELOW	vi.
JURISDICTION	vi-vii.
STATUTES INVOLVED	1-7
STATEMENT OF THE CASE	8-16
REASONS FOR GRANTING THE WRIT	17-34
CONCLUSION	35
CERTIFICATE OF SERVICE	36
APPENDIX A (Opinions and Judgments Below)	
Part I From the Supreme Court of Virginia	
From the Circuit Court of the City of	
Charlottesville, Virginia	A-1-A-13B
APPENDIX A (Opinions and Judgments Below)	
Part II From the Supreme Court of Virginia	
From the Circuit Court of the County of	
Louisa, Virginia	A-14-A-25

LIST OF AUTHORITIES

<u>Davis v. Davis</u> 206 Va. 381 (1965).....	25
<u>General Accident Fire and Life Assurance</u>	

<u>Corp. v. Cohen</u> 203 Va. 810 (1962)	22
<u>Goode v. Courtney</u> 200 Va. 804 (1909)	22
<u>Greene et. al. v. Lindsey</u> ____ U.S. ____, 102 S.Ct. 1874 (1982)	29-30
<u>Landcraft v. Kincaid</u> 220 Va. 865 (1980)	21
<u>Matthews v. Eldridge</u> 424 U.S. 319, 96 S.Ct. 983 (1976)	23
<u>Mullene v. Central Hanover Bank & Trust Co.</u> 339 U.S. 306, 70 S.Ct. 652 (1950)	29-31
<u>Sniadach v. Family Finance Corp.</u> 395 U.S. 337 (1969)	22
<u>Stocket v. Silberman</u> 209 Va. 490 (1969)	21
<u>Truschel v. Rex Amusement Co.</u> 102 W.Va. 215, 136 S.E. 30 (1926)	23

VIRGINIA RULES AND STATUTES

Rule 3:17 of the Rules of the Supreme Court of Virginia	5
Rule 3:18 of the Rules of the Supreme Court of Virginia.....	6
Sections Virginia Code Ann.	
a) §8.01-290	6
b) §8.01-329 (As of May 1979)	2-3
§8.01-329 (As amended 1983)	3-4
c) §8.01-319	1-2
d) §8.01-428	4
e) §8.01-429	5

CONSTITUTIONS

U.S. Constitution Fourteenth Amendment	7
Virginia Constitution Article I Section §11	7

v.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

ELIZABETH Y. BYRUM, et. al.
Petitioners

v.

LOWE & GORDON, LTD.
Respondents

and

BARNEY L. BYRUM, et. al.
Petitioners

v.

GARY B. PATTERSON, LOWE & GORDON, LTD.
et. al.
Respondents

FROM APPEALS IN THE
SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a Writ of Certiorari issue to review the judgments of State Courts of Virginia entered in the above styled cases arising from actions in the Circuit Courts of the City of Charlottesville and Louisa

County, Virginia, and affirmed by orders issued by the Supreme Court of Virginia, June 17, 1983.

OPINIONS BELOW

The opinions of the State Circuit Courts, the Circuit Courts of the City of Charlottesville and Louisa County, and the decisions of the Supreme Court of Virginia are printed in Appendix A to this Petition.

JURISDICTION

The judgment of the Virginia Supreme Court by written opinion was entered on April 29, 1983. A timely Petition for Rehearing was filed and on June 17, 1983, the Supreme Court of Virginia denied the Petition to Rehear. Said appeal arose from an Order of the Circuit Court of the City of Charlottesville, Virginia, entered May 24, 1979, entering a Default and Summary Judgment, which was sought to be vacated by state statutory procedures, the Motion being denied by Order of the said State Circuit Court on June 17, 1980.

Per the Rules of the Supreme Court of the United States, Rule 19.4, a second closely related case is joined in this petition for writ of certiorari. The second judgment of the Virginia Supreme Court involving closely related questions involving the same parties and others, and a petition for writ of review on a Judgment dated June

5, 1981 from the Louisa County Circuit Court, Virginia was made before the Virginia Supreme Court and it was denied June 17, 1983, the Supreme Court of Virginia withholding said decision on the writ until final disposition of the first judgment noted above and the petition to rehear were disposed of, which led to said denial of the writ of review.

Jurisdiction of the Court is involved under 28 U.S.C. §1257(3).

VIRGINIA STATUTES INVOLVED

§8.01-319. Publication of interim notice. — A.

In any case in which a nonresident party or party originally served by publication has been served as provided by law, and notice of further proceedings in the case is required but no method of service thereof is prescribed either by statute or by order or rule of court, such notice may be served by publication thereof once each week for two successive weeks in a newspaper published or circulated in the city or county in which the original proceedings are pending. If the original proceedings were instituted by order of publication, then the publication of such notice of additional or further proceedings shall be made in the same newspaper. A party, who appears pro se in an action, shall file with the clerk of the court in which the action is pending a written statement of his place of residence and mailing address, and shall inform the clerk in writing of any changes of residence and mailing address during the pendency of the action. The clerk and all parties to the action may rely on the last written statement filed as aforesaid. The court in which the action is pending may dispense with such notice for failure of the party to file the statement herein provided for or may require notice to be given in such manner as the court may determine.

B. Notwithstanding any provision to the contrary in paragraph A hereof, depositions may be taken, testimony heard and orders and decrees entered without an order of publication, when the defendant has been legally served with or has accepted service of process to commence a suit for divorce or for annulling or affirming a marriage, and he or she or the plaintiff:

1. Shall thereafter become a nonresident; or

2. Shall remove from the county or city in which the suit is pending, if a resident thereof, or in which he or she resided at the time of the institution of the suit, or was served with process, without having filed with the clerk of the court where the suit is pending a written statement of his or her intended future place of residence, and a like statement of subsequent changes

of residence; or

3. When after such written statement has been filed with the clerk, notice shall have been served upon him or her at the last place of residence given in the written statement as provided by law.

4. Could not be found by the sheriff of the county or city for the service of the notice, and the party sending the service makes affidavit that he has used due diligence to find the adverse party without success. If such absent party has an attorney of record in such suit, notice shall be served on such attorney, as provided by §8.01-314.

C. This section shall not apply to orders of publication in condemnation actions. (Code 1950, §8-76; 1950, p. 68; 1954, c. 333; 1960, c. 16; 1970, cc. 241, 279; 1977, c. 617; 1978, c. 676; 1979, c. 464; 1982, c. 384.)

§8.01-329. Service of process or notice. — A.

When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made in the same manner as is provided for in chapter 8 (§8.01-285 et seq.) of this title in any other case in which personal jurisdiction is exercised over such a nonresident party, or process or notice may be served on any agent of such person in the county or city in this State in which he resides or on the Secretary of the Commonwealth of Virginia, hereinafter referred to in this section as the "Secretary," who, for this purpose, shall be deemed to be the statutory agent of such person.

B. Service of such process or notice on the Secretary shall be made by leaving a copy of the process or notice, together with the fee prescribed in §14.1-103 in the hands of the Secretary or in his office in the city of Richmond, Virginia, and such service shall be sufficient upon the nonresident, provided that notice of such service and a copy of the process or notice are forthwith sent by registered or certified mail, with delivery receipt requested, by the Secretary to the defendant or defendants at such defendant's or defendants' last known post-office

address, and an affidavit of compliance herewith by the Secretary or someone designated by him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action. (Code 1950, §8.813; 1977, c. 617.) (Note: Statute in effect May 24, 1979 at time of Charlottesville Circuit Court Order.)

8.01-329. Service of process or notice. — A.

When the exercise of personal jurisdiction is authorized by this chapter, service of process or notice may be made in the same manner as is provided for in chapter 8 (§8.01-285 et seq.) of this title in any other case in which personal jurisdiction is exercised over such a non-resident party, or process or notice may be served on any agent of such person in the county or city in this State in which he resides or on the Secretary of the Commonwealth of Virginia, hereinafter referred to in this section as the "Secretary," who, for this purpose, shall be deemed to be the statutory agent of such person.

A1. When service is to be made on the Secretary, the party seeking service shall file an affidavit with the court, stating either (i) that the person to be served is a nonresident or (ii) that, after exercising due diligence, the party seeking service has been unable to locate the person to be served. In either case, such affidavit shall set forth the last known address of the person to be served.

B. Service of such process or notice on the secretary shall be made by leaving a copy of the process or notice, together with a copy of the affidavit called for in paragraph A1 hereof and the fee prescribed in §14.1-103 in the office of the Secretary in the city of Richmond, Virginia. Such service shall be sufficient upon the person to be served, provided that notice of such service, a copy of the process or notice, and a copy of the affidavit are forthwith sent by registered or certified mail, with delivery receipt requested, by the Secretary to the person or persons to be served at the last known post-office address of such person, and an affidavit of compliance herewith by the Secretary or someone designated by

him for that purpose and having knowledge of such compliance, shall be forthwith filed with the papers in the action.

C. The Secretary shall retain a copy of each notice of service which he has sent to a person sought to be served for a period of two years; provided, however, that the Secretary shall not be required to retain in his records copies of any process, notice or affidavit served upon him. (Code 1950, §8-813; 1977, c. 617; 1979, c.31.)

§8.01-428. Setting aside default judgments; clerical mistakes; independent actions to relieve party from judgment or proceedings; grounds and time limitations.

— A. Default judgments and decrees pro confesso; summary procedure. — Upon motion of the judgment debtor and after reasonable notice to the opposite party, his attorney of record or other agent, the court may set aside a judgment by default or a decree pro confesso upon the following grounds: (i) fraud on the court, (ii) a void judgment, (iii) on proof of an accord and satisfaction. Such motion on the ground of fraud on the court shall be made within two years from the date of the judgment or decree.

B. Clerical mistakes. — Clerical mistakes in all judgments or other parts of the record and errors therein arising from oversight or from an inadvertent omission may be corrected by the court at any time on its own initiative or upon the motion of any party and after such notice, as the court may order. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending such mistakes may be corrected with leave of the appellate court.

C. Other judgments or proceedings. — This section does not limit the power of the court to entertain at any time an independent action to relieve a party from any judgment or proceeding, or to grant relief to a defendant not served with process as provided in §8.01-322, or to set aside a judgment or decree for fraud upon the court. (1977, c. 617.)

§8.01-429. Action of appellate court when there might be redress under §8.01-428. — No appeal shall be allowed by the Supreme Court or any justice thereof for any matter for which a judgment or decree is liable to be reversed or amended, on motion as aforesaid, by the court which rendered it, or the judge thereof, until such motion be made and overruled in whole or in part. And when the Supreme Court hears a case wherein an appeal has been allowed, if it appears that, either before or since the same was allowed, the judgment or decree has been so amended, the Supreme Court shall affirm the judgment or decree, unless there be other error; and if it appear that the amendment ought to be, and has not been made, the Supreme Court may make such amendment, and affirm in like manner the judgment or decree, unless there be other error. (Code 1950, §8.349; 1977, c. 617.)

SUPREME COURT OF VIRGINIA RULES OF COURT INVOLVED.

Rule 3:17. Judgment by Default.

A defendant who fails to plead to a notice of motion for judgment within the required time is in default. He waives trial by jury and all objections to the admissibility of evidence. He is not entitled to notice, including notice to take depositions, of any further proceedings in the case except that no judgment by default shall be entered, when service of process is effected by posting pursuant default shall be entered, when service of process is effected by posting pursuant to §8.01-296 (2)(b), until ten days' notice shall have been given as required by that section. The court shall, on motion of the plaintiff, enter judgment for the amount appearing to the court to be due. If the relief demanded is unliquidated damages, the court shall hear evidence and fix the amount thereof, unless the plaintiff demands trial by jury, in which event, a jury shall be impaneled to fix the amount of damages.

Rule 3:18. Summary Judgment

Either party may make a motion for summary judgment at any time after the parties are at issue. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor. Summary judgment, interlocutory in nature, may be entered as to the undisputed portion of a contested claim or on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment shall not be entered if any material fact is genuinely in dispute. No motion for summary judgment or to strike the evidence shall be sustained when based in whole or in part upon any discovery depositions under Rule 4:5 unless all parties to the action shall agree that such deposition may be so used.

§8.01-290. Plaintiffs required to furnish full name and last known address of defendants, etc. — Upon the commencement of every action, the plaintiff shall furnish in writing to the clerk or other issuing officer the full name and last known address of each defendant and if unable to furnish such name and address, he shall furnish such salient facts as are calculated to identify with reasonable certainty such defendant. The clerk or other official whose function it is to issue any such process shall note in the record or in the papers the address or other identifying facts furnished. Failure to comply with the requirements of this section shall not affect the validity of any judgment. (Code 1950, §8.46.1; 1962, c. 10; 1977, c. 617.)

UNITED STATES
CONSTITUTION

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF VIRGINIA

§11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases. — That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

STATEMENT OF CASE

This petition presents an unusual and complicated set of facts and a multitude of events and State statutory procedures embracing decisions of two State lower Circuit Courts wherein, John C. Lowe, Byrums' former attorney was able with the aid of a State Court to rush through a questionable procedural maneuver while the Byrums defended themselves pro se after a long, diligent search through many attorneys none of whom would stand up against Mr. Lowe's ramrod maneuvers. It is incumbent by the rules of this Honorable and Supreme Court that petitioners be concise, brief and clear. Mr. and Mrs. Byrum shall do so and request the Court's patience in that the petitioners stand to lose their property.

Mr. and Mrs. Byrum, who are citizens of the United States and are Virginia residents allege they are being deprived of property, both real property and monetary property, by certain Virginia legislated legal procedures and decisions of the Virginia State Courts.

These decisions so obtained by Mr. John C. Lowe, a Virginia attorney practicing law in Charlottesville, Virginia, who became his clients' creditor, the Byrums assert are fundamentally unfair, unjust, and wrong legally to the extent that their individual rights under the United States Constitution as protected by the due process clause of the Fourteenth amendment are violated. They assert

that they have been denied a trial that was assured to them, that they received inadequate notice to a motion for default and summary judgment requested by their former counsel and that the latter was obtained in their absence, that the notice of the sale of their property six months later was not sent to their proper address per their request by a receipted certified mail to John C. Lowe received by Mr. Lowe, that their attorney retained after the default and summary judgment from Ashland, Virginia who was dealing with the John C. Lowe matter for over four months including the time of the forced sale of their land was not informed of the sale although she had requested to be informed, and that although another attorney who practiced in Charlottesville, Virginia made diligent efforts to stop the sale when contacted by the Byrums four days before the sale, that she as their counsel was ignored by John C. Lowe, his office and Gary B. Patterson, the Trustee.

The Virginia Supreme Court has recently sustained by its written opinion of April 29, 1983 (Appendix A/3) the entry of a "default and summary judgment" against Barney L. Byrum and Elizabeth Y. Byrum (Hereinafter "Mr. and Mrs. Byrum") in the City of Charlottesville Circuit Court, Virginia. The said default and summary judgment thereupon provided the initial basis for the Virginia creditor, Mr. Lowe, to later force a sale of Mr. and Mrs. Byrums' 137 acre Virginia farm in Louisa County Virginia by using a deed of trust that Mr. Lowe had

extracted from his clients under the threat of leaving them at a critical time during his legal representation of the Byrums from 1974-76. The deed of trust to Mr. Lowe secured a bond for future legal services up to the amount of \$5,000.00, the same \$5,000.00 stated in writing by Mr. Lowe to be his approximate maximum cost of all legal services for the Byrums.

Mr. and Mrs. Byrum claimed that they had paid by evidence of their cancelled checks to Mr. Lowe \$3,600.00 of the bond and owed only \$1,400.00 on the \$5,000.00 due and therefore denied they owed the large cash amount claimed by Mr. Lowe that by the default and summary judgment he readily gained through a Court Order dated May 24, 1979 from the Circuit Court of Charlottesville, Virginia. The Byrums, prior to the May 24, 1979 Order of default and summary judgment, by long distance phone at the March 1979 civil docket call, announced their whereabouts in Florida and available dates to the Court's secretary requesting a trial date after July, 1979. The Court's secretary gave an assurance to the Byrums that it would be no sooner.

Mr. Lowe was there with the Court and obtained a June 15, 1979 trial date. The Byrums had asked for a jury trial, but this trial would be later discarded by the Court when its Order of May 24, 1979 was entered. The Byrums were busy with problems due to deaths in the family and thinking the trial would be after July, 1979, but they alerted friends to forward mail from their

Virginia residence. Certified mail was used by the Court to notify them of the June 15th trial date, but the mail went to their son's Maryland address where no one claimed the certified mail, because their son was away on Government business. It was returned "unclaimed." The Court never sent regular mail nor tried again to contact the Byrums nor did Mr. Lowe, nor did he use regular mail, certified mail always being used and sent where Mr. and Mrs. Byrum happened not to be. Regular mail would have sufficed as they had friends forwarding their mail.

Mr. and Mrs. Byrum had to fight the forced sale of their Virginia farm some seven months later in the Circuit Court of Louisa, Virginia at a trial with restricted issues after having had attempted to redeem their farm prior to that 1979-81 trial in the Circuit Court of Louisa County challenging the sale. Mr. and Mrs. Byrum in such attempts personally tried by phone a day before the November 19, 1979 sale to redeem their land and utilized a Charlottesville lawyer 4-5 days before the land sale who had helped them previously on an unrelated matter. Those efforts by that attorney hired for the moment included a half-hour before-the-sale phone call attempt to redeem the Byrums' farm, and by the evidence presented, was totally ignored by Mr. Lowe, the creditor, and Mr. Patterson, the Trustee, who proceeded to the Courthouse steps to auction the farm. Mr. and Mrs. Byrums' previous phone calls to Mr. Lowe made the day before the forced sale of the Byrums' Virginia farm were

not returned by Mr. Lowe even though as the evidence showed a member of his firm assured the Byrums that Mr. Lowe would call back. The Louisa Circuit Court in its opinion (Appendix A/21-23) held the Byrums had made no such redemption efforts, although three attorneys testified they personally made such efforts.

Mr. Lowe had also refused settlements from a Ashland, Virginia attorney during July-October 1979, and although such cash settlement offers were completely in excess of the \$5,000.00 alleged redemption price first claimed during the Louisa Circuit Court trial to be due by the Trustee of the sale and the limit of the amount recited in the bond, it was refused. Mr. Lowe continually, as a creditor with a default judgment in hand, always demanded the \$13,319.44 he gained by the default judgment obtained in absentia of the Byrums, (Appendix A/12) and never the true amount due under the bond and deed of trust.

Mr. and Mrs. Byrum were seriously handicapped after the default judgment was entered on May 24, 1979 unbeknown to them. Although they finally retained an attorney on July 1, 1979, their efforts after May 24, 1979 to resolve matters with their former attorney were greatly limited by the need to care for their comatose son who had received a serious head injury on August 2, 1979 and was hospitalized for six months, August-November 1979 in Charlottesville and November 1979-February 1980 in Georgetown. The forced sale of the Byrums'

Virginia farm occurred on November 19, 1979 on the Louisa County Circuit Courthouse steps while the Byrums, still uncertain of their Comatose son's survival, were with him in a hospital in the Georgetown area waiting for Mr. Lowe to answer their call on that day.

Due to the fact that Mr. Lowe had previously obtained the default judgment on the Byrums from the Circuit Court of Charlottesville, Virginia (which an appeal to the Virginia Supreme Court was being processed in the Summer and Fall of 1980 per section §8.01-429 of the Virginia Code from the Order of June 17, 1980, Appendix A/8-9), the Louisa County Circuit Court in the land sale trial, which took from December 1979 and to the Spring of 1981 and contested the forced land sale under the deed of trust (both Courts are part of the Virginia Sixteenth Judicial Circuit), the Louisa County Circuit Court refused any amendments to the Byrums' pleadings in equity that touched on the attorney-client contractual relationship of Mr. Lowe citing the Circuit Court of Charlottesville decision and those amendments were, the Louisa Circuit Court held, "not germane" to the forced sale. (Appendix A/24-25)

The Byrums, as to any substantive evidence that might have successfully attacked the validity or legality of Mr. Lowe's attorney contract with them and that would have assisted in questioning the bond and the deed of trust instruments on Mr. and Mrs. Byrum's land that Mr. Lowe extracted from his clients to continue his legal representation, were barred and stricken (on Mr. Lowe's

Motion) by the Louisa County Circuit Court ruling. The Louisa County Circuit Court restricted the issues to adequacy of price on the Byrums' farm and any alleged irregularities of the sale by the successor trustee as well as his appointment in the Circuit Court of the City of Charlottesville. (The land's present worth is in excess of \$100,000.00 and was sold for \$31,000.00 at the November 19, 1979 auction to a friend of fifteen years of Mr. Lowe's.

The net result of all actions of these two Virginia Circuit Courts was to give Mr. Lowe absolute control to collect, uncontested, the money he won on a default judgment from his former clients without his claims arising out of the attorney-client contract drawn together with Mr. and Mrs. Byrum, their pleaded denial in their answer to the claims he made in two lawsuits in the Circuit Court of the City of Charlottesville, Virginia, ever receiving an evidentiary and adversary hearing or trial on the merits.

The Virginia Supreme Court did grant a writ of review on the lower court which entered the default and summary judgment. However, by reason of its written opinion of April 29, 1983, the Court reaffirmed, on a petition to rehear, by its decision of June 17, 1983, the default and summary judgment. (Appendix A/1).

In considering that lower Court decision as provided by appellate review, the Virginia Supreme Court decided to withhold its decision on the Byrums' application for a writ of review on the forced land sale of Mr. and Mrs.

Byrums' Virginia 137 acre farm in the Circuit Court of Louisa County, Virginia which decision had been properly appealed until the Virginia Supreme Court disposed of its granted appeal on the Charlottesville Circuit Court judgment. The Louisa Circuit Court had previously suspended and vacated its June 5, 1981 decision until that occurred by Orders of July 22, 1981 (Appendix A/17) and August 13, 1981 (Appendix A/15-16.)

By decision of the Virginia Supreme Court dated June 17, 1983, it denied a writ of review on the forced sale of the Byrums' farm in the Louisa Circuit Court and held "no reversible error" as being the reason to deny a writ of review in that case.

Mr. and Mrs. Byrum thus now stand to lose their entire Virginia farm obtained by a lifetime of work for attorney fees obtained by a default and summary judgment if these decisions of the Virginia State Courts are upheld.

The Byrums always denied the amount of money alleged by Mr. Lowe and have not to this date been afforded an evidentiary and adversary hearing which they assert was taken away from them without adequate notice and safeguards and by improper use of state procedures. Thus the Byrums attack the procedures that gained the default and summary judgment and the decisions that ultimately may deprive them of their real property and livelihood as fundamentally unfair and that due process has not been afforded them by these decisions nor by the procedures used to obtain those decisions. The Byrums still pay the taxes and maintain

the property. The state of legal limbo makes it impossible for them to produce income from the land's timber crop or to sell any portion of their land.

For the record, counsel who represented the Byrums after the May 24, 1979 Order of the Circuit Court of the City of Charlottesville and up to the November 14, 1979 sale of their land, whom the Byrums say Mr. Lowe and Mr. Patterson ignored, were Nina Peace of Ashland, Virginia, Susan White of Charlottesville, Virginia, and Nancy Stamm of Charlottesville, Virginia.

Also for the record, Bear Investment Company, respondent, represented by W. W. Whitlock, Esquire of Mineral, Virginia, purchased the Byrums land at the land auction of November 19, 1979. The President of the Corporation, A. G. Johnson, who testified he knew Mr. Lowe for at least 15 years, made the \$31,000.00 bid at the forced land sale.

REASONS FOR GRANTING THE WRIT

Compelling reasons are why a review on Writ of Certiorari should be granted in this case.

1. The State processes and procedures utilized by Mr. Lowe and sustained by the State Courts to obtain the default and summary judgment against Mr. and Mrs. Byrum and thereby provide Mr. Lowe's legal basis to force a sale of the Byrums' Virginia farm to extract money violates their rights of substantive and procedural due process guaranteed by the Fourteenth Amendment of the United States Constitution.

2. The use of a Virginia statute against pro se defendants as used by Mr. Lowe under Virginia Code Section 8.01-319 is entirely suspect as to pro se defendants, and, by its procedural effect in this case by all the circumstances, using inadequate notice for non-residents per section §8.01-329 (when the Byrums were Virginia residents), the same ultimately deprived Mr. and Mrs. Byrum of their property without due process.

3. By foreclosing any evidence challenging Mr. Lowe's legal contract in the Louisa Circuit Court that allowed the Charlottesville Circuit Court default judgment to have a res adjudicata effect, the forced sale of the Byrums' land with the combined decision of the Circuit Court of Charlottesville and Louisa County Circuit Court

to deprive Mr. and Mrs. Byrum of their Virginia 137 acre farm without due process of law.

I

This Petition presents an unusually and complicated set of facts and a multitude of events and state statutory procedures embracing decisions of two state lower Circuit Courts.

Because of the injustice herein recited, I and Mr. and Mrs. Byrum ask for the Court's patience due to the nature of this case.

It is incumbent upon the highest Court of America to scrutinize for these American citizens the Virginia state processes and procedures that would allow such an unfair decision whereby a creditor, a former attorney whose clients became his debtors, obtains an unfair judicial decision and by the impetus of it, later sells their farm to gain his legal fees without the State ever affording the debtors an evidentiary trial on those fee claims that were in fact set at a civil docket call in Charlottesville Circuit Court and later completely discarded on the sole demand of the creditor Mr. Lowe, who obtained in abstentia of the Byrums, a default and summary judgment for \$13,319.44 per §8.01-319, Va. Code. Ann.

A. IN THE CHARLOTTESVILLE CIRCUIT COURT
OF VIRGINIA

Mr. Lowe or his office drafted and presented

an order in abstentia of the Byrums (Appendix A/10-13) to present to the Charlottesville Circuit Court that went beyond being merely self-serving so to garner an unjust and unfair decision. It represents that the Court gave "every reasonable opportunity to the defendants to appear and to cure their default under section §8.01-319" which by the evidence would not appear to be true. The order was entered May 24, 1979. One of the Byrums son, residing in Maryland, did not receive certified mail at his address giving notice of the motion for default and summary judgment until May 25, 1979, a day after the order had already been entered. (Emphasis added). Mailing it promptly to the Byrums who had commitments in the South due to family deaths, the letter was not seen until June 15, 1983. Immediately a call to the Judge was made to request help. The Byrums contacting Virginia lawyers, no one would help them. The Court would not help them.

The May 24, 1979 Charlottesville Circuit Court Order states that the Court gave "every reasonable opportunity....properly to notify the Court and the plaintiff of their residence", (Appendix A/12), and, that "the ends of justice require the Court to grant the motion for summary and default judgment in this matter because of the long, vexatious dilatory and unreasonable conduct by the defendants...". This is not true.

First, appearing pro se, Mr. and Mrs. Byrum were sued twice, the first lawsuit being nonsuited. (See Appen-

dix A/13A) They were served personally at their Virginia farm address in the first lawsuit, the address being provided by Mr. Lowe. Having been the Byrums' attorney for several years, he knew their Virginia address and he knew several out of state addresses including a Florida address and he used them from time to time through the years of his representation but failed to use all of them when giving notice that he was demanding a default and summary judgment. When Mr. Lowe did not gain his amendment to that first lawsuit to request a greater monetary claim (Circuit Court of the City of Charlottesville Law #1751), he nonsuited, and the Byrums, who had traveled a 1000 miles from their personal family problems in Florida to Charlottesville in a snow storm and being there physically for trial, were instantaneously on the nonsuit served with a second lawsuit by Mr. Lowe asking for nearly 3 times more money. No issue of address then ever arose. Making it an issue came post facto on Mr. Lowe's motion per §8.01-319 of the Virginia Code.

The point being Mr. Lowe had no problems, nor had the Court, in knowing the Byrums true address in the first Charlottesville lawsuit, Law #1751. Out of the blue, it was declared as a problem in the second Charlottesville lawsuit, #1879. When this evidence was attempted to be shown the Virginia Supreme Court, it was stricken from the record on motion of Mr. Lowe to the Supreme Court. (Appendix A/7).

The procedures and processes that Mr. Lowe utilized

to gain a default and summary judgment arise nearly totally on the alleged failure of the Byrums to provide an address which allegation the Court accepted uncontested. The Charlottesville Circuit Court ruled in its May 24, 1979 order, that because no address was presented in violation of §8.01-319 of the Virginia Code, the Byrums' "pleadings are stricken." (Appendix A/11)

First, the Rules of Court of the Supreme Court of Virginia governing default and summary judgments are explicit. As to a default judgment, Rule 3:17 states that a defendant who fails to plead to a notice of motion for judgment "within the required time is in default." (Emphasis added) The Virginia Supreme Court in its written opinion readily conceded that "the Byrums again proceeding pro se, filed a timely response to this motion for judgment." (Appendix A/4) (Emphasis added)

It does not take a great deal of legal logic to then conclude the Byrums could not as a matter of Virginia law be legally in "default" and the only way in Virginia one can be in default is by a failure to file a timely response. (Stocket v. Silberman 209 Va. 490 (1969). In a recent Virginia case Landcraft v. Kincaid 220 Va. 865 (1980), the Virginia Supreme Court held "for a reason not explained in the record ... he (Kincaid) was in default when he failed to timely file responsive pleadings." The Byrums in no way by the Virginia law and decisions failed to timely respond, and therefore were not in default.

The Charlottesville Circuit Court ruled in its May 24, 1979 order (Appendix A/11) that because no address was presented in violation of §8.01-319 of the Virginia Code, the Byrums "pleadings are stricken."¹

Likewise, the Rules of the Supreme Court of Virginia, Rule 3:18 states that summary judgment "shall not be entered if any material fact is genuinely in dispute." (Emphasis added) The Byrums' pleadings which were stricken by order of the Charlottesville Circuit Court, denied Mr. Lowe's complaint and alleged defenses to his claims and, without question, material facts thereby were genuinely in dispute. Virginia cases define Rule 3:18 and have repetitively held for the principle stated above. Goode v. Courtney 200 Va. 804 (1909); General Accident Fire and Life Assurance Corp. v. Cohen 203 Va. 810 (1962)

The traditions of our people from this country's birth have stood for fairness and every person's right to have his day in Court. The state has enforced a private claim by a creditor to property of persons and acted to deprive someone of their property by a default and summary judgment. Due process is essential in depriving the person of his property and an adequate evidentiary hearing with adequate notice is fundamental. Sniadach v. Family Finance Corp. 395 U.S. 337 (1969).

¹ Being Virginia residents and served originally at their farm address, good for over twenty years, Mr. Lowe did not put the address on his second lawsuit as he did the first. §8.01-290 requires the same.

The Court did set the Byrums a trial date for June 15, 1979. With the default/summary judgment, the Court simply discarded on Mr. Lowe's representations of May 24, 1979 by the State Circuit Court.

The fundamental requirement of due process of law is an opportunity for a hearing and defense. Truschel v. Rex Amusement Co. 102 W.Va. 215, 136 S.E. 30 (1926), cert. denied 274 U.S. 736, 47 S.Ct. 574, 71 L.Ed. 1316 (1927). Due process unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances. Matthews v. Eldridge 424 U.S. 319, 96 S.Ct. 983, 47 L.Ed. 2d 18 (1976). Mr. Lowe and the State Courts have interpreted and applied technical rules that in any other and more fair setting, than the unfair one Mr. Lowe garnered by a default and summary judgment, would not likely stand precedural due process tests.

However, all the facts together and circumstances here when seen as a whole in time and place shall unquestionably by the State Courts' decisions deprive the Byrums of their property without due process. The Byrums were not technically in default nor was a summary judgment proper. Yet the Virginia Supreme Court states that decision became "final" and was not timely appealed. Default judgments are peculiar and not like other judgments particularly when they are later discovered.

Justice demands as the Constitution demands

that the Byrums not be deprived of their property by the Virginia State Court's decisions without due process of law.

II

The use of a Virginia statute against pro se defendants as used by Mr. Lowe under Virginia Code Section 8.01-319 is entirely suspect as to pro se defendants, and, by its procedural effect in this case by all the circumstances, using inadequate notice for non-residents per section §8.01-329 (when the Byrums were Virginia residents), the same ultimately deprived Mr. and Mrs. Byrum of their property without due process.

A. IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

Section §8.01-319, used by Mr. Lowe to gain the default and summary judgment, was enacted in 1977 with the revision of the Virginia Civil Code, Title 8.

Section §8.01-319 by the Reviser's notes, Report of the Virginia Code Commission to the Governor and the General Assembly of Virginia, House Document #14, 1977, was old section §8-76, used for non-residents for service by publication except when defendants had been served by 8-51 (personal service) or 8-54, exclusively for divorce cases and if the defendant became a non--

resident thereafter. Up to the Virginia General Assembly revision of Title 8 in 1977, this section was only amended in 1970 requiring an affidavit as to any notice in a divorce action and one had to state in such affidavit that the party had used due diligence to locate the plaintiff without success and that the party had become a non-resident or left where they resided since the suit for divorce, or for annulling or affirming a marriage was filed and service made, and he or she or the plaintiff have thereafter become a non-resident and so on down the line. The revisers' notes state 8.01-319 is old 8-76. (Subsequent revisions in 1978, 1979, 1982 have not materially or substantively altered this statute or its import.)

The Virginia Supreme Court stated in Davis v. Davis 206 Va. 381 (1965) that section 8-76 (predecessor of §8.01-319) and section 8-54 are specific legislation which relate in concise terms specifically to divorce suits. (emphasis added) In fact the 1979 Virginia General Assembly made it clear by adding the language following the word "divorce" in the introductory paragraph of subsection "B" of §8.01-319, "or annulling or affirming a marriage."

The Latin maxim of antiquity in the law, "Expressio Unius Est Exclusio Altenius", the expression of one thing is the exclusion of another would apply in construing the intent of the Virginia General Assembly. The word "Divorce" and the judicial construction of the predecessor statute would clearly indicate that this statute, by the

General Assembly's intent, applies specifically to divorce actions and governs parties in such actions who appear pro se and later become non-residents. This was Mr. Lowe's sole authority in his motion to demand a default and summary judgment against his former clients whom he knew were Virginia residents, not non-residents, and certainly not parties involved in a divorce proceeding. The Virginia Supreme Court has sustained the use of this statute by Mr. Lowe when obviously the statute confers no authority to enter default and summary judgments against resident pro se defendants muchless any defendant, resident or non-resident, who is any party but a party in a divorce proceeding or in annulling or affirming a marriage.

The application of section §8.01-319 by the State Courts took away from the Byrums their scheduled trial date of June 15, 1979. No less, it not being the applicable statute to these pro se defendants, its use that was without any conferring authority to allow a default and summary judgment deprived Mr. and Mrs. Byrum of a hearing and their property without due process. To interpret it otherwise would make the statute vague and therefore unconstitutional if it is not so deficient already in its present form.

Considering then the argued misapplication of section §8.01-319, and even if it could somehow be construed to be an available state statute to be used in favor

of Mr. Lowe, the manner in which Mr. Lowe gave notice of the demand for a default and summary judgment, is latently defective as to minimum safeguards to guarantee due process of providing actual notice of an adversary hearing. Mr. Lowe certified to the Court he had sent personally certified mail to the Virginia farm address. It came back "unclaimed" before he demanded the May 24, 1979 order.

The Byrums as they had announced were temporarily in the South traveling and not at their farm. Nor were they residing at their son's home in Cabin John, Maryland. Thus both certified mails by Mr. Lowe came back "unclaimed" thus vitiating any "actual" notice. The other Maryland address used by Mr. Lowe had long since been abandoned by the Byrums. Mr. Lowe and the Court were aware at the time of these mailings by Mr. Lowe and the Secretary of the Commonwealth that Judge Pickford's "certified" letter of March 1979 addressed to Cabin John, Maryland had been returned "unclaimed." The Byrums asserted that by phone on March 19, 1979 at the civil docket call that their Southern whereabouts were made known to the Court and that commitments there made then unavailable until after July 1979 at which time they could go to trial.

Considering Mr. Lowe obtained a June 15, 1979 date, this fact also was disregarded.

The Cabin John address was not the Byrums' residence which Mr. Lowe knew, but rather the home of Mr. and Mrs. Barney L. Byrum, III the Byrums' son whom as parents and retirees the Byrums visited from time to time. The Secretary of the Commonwealth's salutation was typed to addressee "B.L. Byrum" and "E.Y. Byrum." B. L. Byrum, III signed for the certified mail on May 25, 1979 (The default and summary judgment order being entered the day before on May 24, 1979) Seeing it was from Mr. Lowe, B. L. Byrum, III then forwarded it to his father at a Florida address. The Byrums traveling and on the road, did not see it until June 15, 1979.

The Byrums argued in the State Courts that Mr. Lowe, having represented them, knew they often traveled as retired persons and that they had a traveling address in Florida. Mr. Lowe once sent certified mail to Florida and it was also returned "unclaimed." Mr. Lowe had little success from the use of "certified mail" which by trial and error alone should have suggested he just might use regular mail to addresses that he had used successfully before to give the Byrums notice of his motion.

Mr. Lowe apparently never reported that fact to the Court nor mentioned the Florida address in his self-prepared Order of May 24, 1979 that a Florida address did exist and was used previously by him. The strength of his representations that he tried to reach the Byrums

is that he sent "certified mail." The weakness is that certified mail failed except to the son's Maryland address which came after the May 24, 1979 order was entered. Regular mail to the Virginia farm would have sufficed.

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 70 S.Ct. 652 (1950) is the leading case authority on substituted service requirements to meet procedural due process and also the authority used by the majority opinion of the U.S. Supreme Court in its recent decision Greene et. al. v. Lindsey, _____ U.S. _____, 102 S.Ct. 1874, 72 L.Ed. 2d 249 (No. 81-341) (1982).

The controlling language of Mullane cited in Greene being that it is an elementary and fundamental requirement of due process in any proceeding to be accorded finality that "notice reasonably calculated, under all circumstances., to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections be given." The Byrums were not so apprised which deprived them of a significant interest, their retirement income money, and from that default and summary judgment, Mr. Lowe had the tool of coercion to forced a sale of their real estate from a deed of trust he extracted in his early relationship with his clients for future fees which he used to satisfy that default judgment.

In this regard above, Mr. Lowe used section §8.01-329 of the Virginia Long Arm statute, a procedural

statute to reach out of State non-residents, the Byrums are residents, to give notice that is believed to be inadequate. The statute itself lacks sufficient procedural safeguards to protect a citizen's right of due process. As it applies to the Byrums under all the circumstances, it lacks even more. It appears that this statute could well be unconstitutional on its face as it stood back in 1979. If not facially unconstitutional, it could be unconstitutional in its application to deny the Byrums their right of due process under all the circumstances.

For one such point, no disposition is provided in section §8.01-329 as to the certified mail that the Secretary of the Commonwealth is to send. The only requirement is the affidavit of compliance that it was sent be given and produced to the Court. The statute however states explicitly "delivery receipt requested." This form of notice by postal service with the language "delivery receipt requested" clearly expresses the intent of the General Assembly that it wanted the recipient to acknowledge his receipt of any such notice from a State agent. This would guarantee that actual notice was had and would certainly if that were the case satisfy due process tests and standard of Mullane and Greene.

However the statute does not then say what the Secretary of the Commonwealth is to do with the receipt. Mr. Lowe never informed the Court that any receipt had been returned nor did the Court inquire, nor does

the Secretary of the Commonwealth have any statutory requirement of disposing of the return receipt so to inform the Court and Mr. Lowe. The effect being, the Byrums, who did not receipt the certified mail did not get notice of the hearing and proceeding against them until after the fact and did not know of the hearing.

The Supreme Court of the United States is aware that many states have revised their laws of substituted service after Mullane. Many state statutes have "return receipt requested" or language similar to Virginia's §8.01-329. However, no decision from the Supreme Court has pondered what disposition of the "return receipt" is to be made, and this small gap in an otherwise legitimate process affords great harm to those in litigation. The U.S. Postal Service which affords all Americans certified or registered mail services is service Americans utilize for the very purpose of getting an acknowledgement back from the addressee. It is an economic incentive and an invaluable means of knowing the mail went through.

Therefore if the State by its agents is authorized to utilize this means, certainly due process under the U.S. Constitution and the Virginia Constitution in a judicial setting demands that the State properly dispose of receipted return mail. Only then the Court from out of which it is requested can be properly informed before any State Court can assist a private claim to deprive U.S. citizens of their property without first knowing

whether those U.S. citizens in fact received substituted notice to inform them that an adverse hearing or proceeding was to occur and they have the right to appear and defend. The substituted notice is inadequate otherwise to safeguard due process. It is only simple logic and fairness that such statutory safeguards are mandated by the United States Constitution.

The combination then of Virginia Code §8.01-319 and §8.01-329 by their combined processes and procedure are antiquated examples in a modern and transient society that have due process inadequacies and are deficient safeguards to properly protect substantive or procedural due process as guaranteed by the Fourteenth Amendment and therefore in their present form and effect are repugnant to the United States Constitution. They must be or otherwise, the Byrums are deprived of a sizable amount of money they denied ever owing to Mr. Lowe, were deprived of a trial date to dispute the claim and their Virginia farm is lost in the default judgment so obtained under substituted service being used by Mr. Lowe so to extract the money he had won uncontested.

Can the United States Supreme Court allow such an unfair and such ramrod decisions to stand in Virginia that any reasonable man or woman in this country would say is fundamentally unfair in view of the understood American traditions of our people for fairness and justice? Mr. and Mrs. Byrum asked that this highest legal institu-

tion, the Supreme Court of the United States of America, intervene to protect their individual rights and afford them the guaranteed due process forever inscribed in the most precious of American documents, the United States Constitution.

III

By foreclosing any evidence challenging Mr. Lowe's legal contract in the Louisa Circuit Court that allowed the Charlottesville Circuit Court default judgment to have a res adjudicata effect, the forced sale of the Byrums land with the combined decision of the Circuit Court of Charlottesville and Louisa County Circuit Court deprive Mr. and Mrs. Byrum of their Virginia 137 acre farm without due process of law.

IN THE CHARLOTTESVILLE CIRCUIT COURT AND THE LOUISA COUNTY CIRCUIT COURT, VIRGINIA

Mr. Lowe obtained his default and summary judgment under section §8.01-319 by substituted notice under §8.01-329 of the Virginia Code in the Charlottesville Circuit Court. Using the only available Virginia civil statutes §8.01-428 and §8.01-429 to attack a "default" judgment in Virginia, the Supreme Court of Virginia sustained these procedures and the judgment below.

The Louisa County Circuit Court of Virginia refused

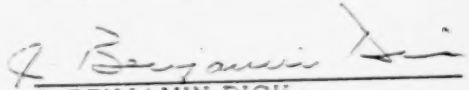
to allow amendments to Mr. and Mrs. Byrums' pleadings that challenged Mr. Lowe's attorney-client contract nor would it allow evidence to challenge what was truly due Mr. Lowe under the bond arrangement for future fees the Court relying on the Charlottesville Circuit Court decision. They were deemed collateral and not sufficiently "germane." (Appendix A/25) The Louisa Circuit Court vacated and suspended its decision to sustain the sale once it learned of the granted writ of review on the Charlottesville Circuit Court case. The ultimate result now in view of the Supreme Court of Virginia decisions to sustain the Charlottesville Circuit Court and refuse a writ of review on the sale of the Byrums' Virginia farm is first, the Byrums were never afforded an evidentiary hearing to contest the alleged fees due, and secondly, a farm appraised in excess of \$100,000.00 without a full value on rents and profits, shall be taken for a \$31,000.00 auctioned sales price under the deed of trust extracted from Mr. Lowe's client's by Mr. Lowe securing a bond executed in 1974 for \$5,000.00.

For this reason and other reasons in the Louisa County Circuit case, the Byrums are forfeiting as well as being deprived of their property without due process of law. The decisions are repugnant to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



J. BENJAMIN DICK
Attorney for the Petitioner

Of Counsel:

LAW OFFICE OF
J. BENJAMIN DICK & JOHN MICHAEL CASSELL
421 Park Street
Charlottesville, Virginia 22901
(804) 977-6607

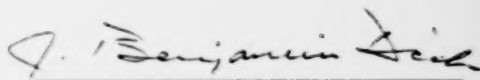
CERTIFICATE OF SERVICE

This is to certify that three copies of this Petition for Writ of Certiorari have been served on all parties required to be served, i.e., on Respondents by placing same in an envelope and depositing it in the United States mail, regular postage prepaid, addressed to counsel of record as follows the 13th day of September, 1983.

John C. Lowe, Esquire
Counsel for Lowe and Gordon, Ltd.
409 Park Street
Charlottesville, Virginia 22901

Richard Arnold, Esquire
Counsel for Gary Patterson, Trustee
Post Office Box 276
Louisa, Virginia 23093

W. W. Whitlock
Counsel for Bear Investment Co.
Post Office Box 128
Mineral, Virginia 23117



J. Benjamin Dick

APPENDIX A
OPINIONS AND JUDGMENTS BELOW

PART I
FROM THE SUPREME COURT OF VIRGINIA

FROM THE CIRCUIT COURT OF THE
CITY OF CHARLOTTESVILLE, VIRGINIA

IN THE SUPREME COURT OF VIRGINIA

No. 801458
Circuit Court No. L-1879

Filed June 17, 1983.

ELIZABETH Y. BYRUM, et al., Appellants

v.

LOWE & GORDON, LTD., Appellee

Upon a Petition for Rehearing

On consideration of the petition of the appellants to set aside the judgment rendered herein on the 29th day of April, 1983, and grant a rehearing thereof, the prayer of the said petition is denied.

/s/ Allen L. Lucy
Clerk

A-2

SUPREME COURT OF VIRGINIA

No. 801458
Circuit Court No. L-1879

Filed April 29, 1983

ELIZABETH Y. BYRUM and BARNEY LUTHER BYRUM, Appellant

v.

LOWE & GORDON, LTD., Appellee

Upon an appeal for a judgment rendered by the
Circuit Court of the City of Charlottesville on
May 24, 1979, and an order entered on June 17, 1980.

For reasons stated in writing and filed with the
record, the court is of opinion that there is no error
in the judgment and order appealed from. Accordingly,
the same are affirmed. The appellants shall pay to the
appellee damages according to law and the costs expended
herein.

This order shall be certified to the said circuit
court.

/s/ Allen L. Lucy
Clerk

FROM THE SUPREME COURT OF
VIRGINIA

Circuit Court of the City of Charlottesville

No. 801458

Filed April 29, 1983

ELIZABETH Y. BYRUM, et al.

v.

LOWE & GORDON, LTD.

Opinion by Justice Roscoe B. Stephenson, Jr.,
Supreme Court of Virginia

In May, 1979, Lowe & Gordon, Ltd., obtained a judgment against Elizabeth and Barney Byrum. The Byrums moved to set aside this judgment in April, 1980, alleging the court erred for various reasons in entering judgment against them. However, the threshold issue on appeal is whether the 1979 judgment could be attacked 11 months later. Concluding it could not, we do not reach the issue of whether the original judgment was proper.

The appellee, a professional corporation engaged in the practice of law, originally filed suit against the Byrums in June, 1978, for money it claimed was due it for legal services rendered. The Byrums, representing themselves, responded to this suit, giving the court an address in Cabin John, Maryland.

In February, 1979, Lowe & Gordon nonsuited the first suit and personally served the Byrums with a new motion for judgment which increased the amount alleged to be due. The Byrums, again proceeding pro se, filed a timely response to this motion for judgment. However, this responsive pleading contained no address, in violation of Code §8.01-319.

In May, 1979, Lowe & Gordon filed a motion for default and summary judgment. It alleged the Byrums had failed to keep the court and opposing counsel advised of an address where they could be reached and that this made prosecution of the case impossible. A copy of this motion was sent certified mail to the Byrums' home in Virginia and other copies were served by the Secretary of the Commonwealth at two addresses in Maryland, including the Cabin John address the Byrums had previously given the court.

In May, 1979, the court held the Byrums were in default and entered judgment for Lowe & Gordon. The court stated that the Byrums' failure to provide an address had prevented the case from proceeding in an orderly manner, that the Byrums had been "given every reasonable opportunity" to appear, and that Lowe & Gordon has "acted entirely reasonably and patiently in attempting to contact" the Byrums. It concluded the Byrums had engaged in "a long, vexatious, dilatory and unreasonable course of conduct."

As no action was taken to modify this judgment within 21 days, it became final. Rule 1:1. Moreover, no appeal was taken from the May judgment in accordance with our Rules of Court. However, in April, 1980, the Byrums, by counsel, filed a "Motion to Vacate Default Judgment Per §8.01-428."

The Byrums admitted that one of the Maryland addresses was the proper place to reach them and that notice of Lowe & Gordon's motion for default and summary

judgment had been received, although a family member failed to forward it to them in a timely fashion. The Byrums further admitted that Lowe & Gordon had attempted to contact them by telephone, but they had failed to provide an address because they felt they were being harassed. After a hearing on this motion, the trial court refused to set aside the May, 1979, judgment, and the Byrums timely appealed from this order.

Code §8.01-428 contains three paragraphs. It is clear that paragraph B, which addresses clerical mistakes, is inapplicable. Paragraph A lists three grounds for setting aside a default judgment. There is no allegation of an accord and satisfaction, and the Byrums have stated they are not proceeding on the ground of fraud on the court. Therefore, in order to fall within paragraph A of the statute, the May, 1979, judgment would have to be void. This is not the case.

The Byrums were properly served with a motion for judgment in February, 1979. The court therefore had personal jurisdiction over them. Further, the Byrums admitted that notice of Lowe & Gordon's attempt to obtain a default judgment against them was received in Cabin John. Therefore, the May, 1979, judgment was not void, and the Byrums are not entitled to relief under §8.01-428A.

As an alternative, the Byrums argue that paragraph C of the statute is applicable. This paragraph also lists three grounds for relief, and again, two, fraud on the court and ineffective service of process, do not apply. The Byrums therefore rely on the first part of this paragraph which states that "[t]his section does not limit the power of the court to entertain at any time an independent action to relieve a party for any judgment or proceeding...."

While the language the Byrums rely on appears broad, we have held it is to be given a narrow construction. Landcraft Co. v. Kincaid, 220 Va. 865, 263 S.E.2d 419

(1980) (involving the predecessor of Code §8.01-428). This is so because judicial proceedings must have a certainty of result, and a high degree of finality must attach to judgments. Landcraft, 220 Va. at 874, 263 S.E.2d at 425.

It is clear the Byrums cannot rely on paragraph C of §8.01-428. The paragraph states that "an independent action" may be brought. The Byrums did not do this. Instead, they filed a motion as part of the cause started in February, 1979. They therefore did not file a proper action under the Code section, and the trial court was correct in refusing to vacate the original judgment.

Paragraphs A and B of Code §8.01-428 speak of a motion, while paragraph C speaks of an independent action. Clearly, by using different terminology in different paragraphs of the same Code section, the General Assembly meant to provide for a different procedure under C than under A and B. This view is reinforced by the Revisers' Note to the Code section which states that paragraph C is meant to preserve "[a] court's inherent equity power to entertain an independent action to relieve a party from any judgment" This view is further reinforced by an examination of the predecessor section of Code §8.01-428, Code §8-348, which provided for relief from a default judgment only upon motion.

In conclusion, the Byrums' motion does not allege sufficient grounds under Code §8.01-428 to attack the May, 1979, default and summary judgment. Accordingly, the judgment of the trial court will be affirmed.

Affirmed.

SUPREME COURT OF VIRGINIA

No. 801-458
Circuit Court No. L-1879

File September 14, 1981

ELIZABETH Y. BYRUM, et al., Appellants,

v.

LOWE & GORDON, LTD., Appellee..

Upon an appeal from a judgment
rendered by the Circuit Court of the
City of Charlottesville on May 24, 1979,
and an order entered on June 17, 1980.

Heretofore came the appellee, by counsel, and
filed a motion praying, inter alia, that the court strike
from the appendix in this case all matters relating to
Law No. 1751 (pages 118, et seq.).

Thereupon came the appellants, by counsel, and
filed a response in opposition to said motion.

On consideration whereof, the appellee's motion
to strike is granted.

/s/ Allen L. Lucy
Clerk

Circuit Court for the City of Charlottesville

At Law No. 1879

Filed June 17, 1980

LOWE & GORDON, LTD., Plaintiff

v.

BARNEY L. BYRUM, et al., Defendants

ORDER

This cause came to be heard on Defendants' Motion to Vacate the Judgment of this Court and upon Motion of the Defendants, the cause was ordered reinstated upon the docket and the motion was heard ore tenus on May 16, 1980; Craig T. Redinger, Esq., appearing as counsel on behalf of Plaintiff and Defendants appearing with their counsel, J. Benjamin Dick, Esq.

Upon hearing arguments of counsel, the Court finds that the findings of fact contained in its order of May 24, 1979, are correct, the Court finds no evidence of fraud nor does the Court find anything to merit vacating the default judgment previously entered and the Court further finds there are no grounds for an independent action to attack or modify the judgment contained in its order of May 24, 1979, and it appearing otherwise proper, it is hereby

ORDERED, that Defendants' Motion to Vacate the Default Judgment be and it hereby is denied and the Clerk is directed to strike this cause from the docket.

A-9

ENTERED this 17th day of June, 1980.

/s/ Herbert A. Pickford
Judge

Circuit Court for the City of Charlottesville

At Law No. 1879

Filed May 24, 1979

LOWE AND GORDON, LTD., Plaintiff

v.

ELIZABETH Y. BYRUM

AND

BARNEY LUTHER BYRUM, Defendants

ORDER

This day came the plaintiff, and moved the Court to grant it summary and default judgment against the defendants for their failure to comply with the requirements of Virginia law in regard to this cause, and upon: The motion for default and summary judgment filed by the plaintiff with notice that the plaintiff would ask the court to enter judgment on the motion at 12:00 noon on May 20, 1979, which written motion was filed with the Court; affidavits from the Secretary of the Commonwealth indicating that a copy of the motion for default and summary judgment had been served upon the defendants pursuant to Va. Code Ann. §8.01-329 at both Box 284, Glen Arm, Maryland 21057 and at 7706 Tomlinson Avenue, Cabin John, Maryland 20731; sworn testimony from John C. Lowe, President of Lowe and Gordon, Ltd., that a copy of the motion for default and summary judgment had been mailed to the defendants at Route 3, Box 448, Orange, Virginia 22960, along with

a P.S. Form 3800 indicating such mailing had taken place; all of the papers filed in Law Number 1879 and Law Number 1751, files of this Court; an original promissory note dated December 31, 1974, payable to Lowe and Gordon, Ltd., in the amount of \$3,189.89 bearing 8% interest from December 31, 1974, until paid, executed by the defendants; upon an original promissory note dated December 23, 1972, payable to Lowe and Gordon, Ltd., in the amount of \$3,296.72, bearing 8% interest from September 23, 1974, until paid, executed by the defendants; a copy of an amended bill of interpleader in the Circuit court for Montgomery County, Maryland, in the case of Carlton Maryott v. Elizabeth Y. Byrum and Barney Luther Byrum, et al., Equity Number 60.600 which was identified by John C. Lowe, president of Lowe and Gordon, Ltd.; a copy of a petition for authority to pay into registry of court, a check for \$7,500.00 in the matter of Carlton Maryott v. Elizabeth Byrum, et al., Equity Number 60.600 in the Circuit Court for Montgomery County, Maryland, with an attached notation to the effect that the check could not be paid into court without the endorsements of Elizabeth Y. Byrum and Barney Luther Byrum; and the ore tenus sworn testimony by John C. Lowe, president of Lowe and Gordon, Ltd., the Court doth make the following findings of fact and conclusions of law.

1. Elizabeth Y. Byrum and Barney L. Byrum have failed to notify this Court or the plaintiff or counsel for the plaintiff of their place or residence and mailing address, or of any changes of residence or in mailing addresses during the pendency of this action, pursuant to Va. Code Ann. §8.01-319, therefore their pleadings are stricken.

2. Using three prior known addresses of the defendants in Glen Arm, Maryland, Cabin John, Maryland and Orange, Virginia, the plaintiff (a) has been unable to contact the defendants for the purpose of proceeding in an ordering manner with discovery and other matters in this suit, all to the detriment of the plaintiff and in controvention of Virginia law, and (b) has properly served the defendants at the aforementioned three addresses with notice of a hearing on the plaintiff's motion for

summary and default judgment, utilizing the Secretary of the Commonwealth, pursuant to Va. Code Ann. §8.01-329 as to the Maryland addresses, and by sending a notice by certified mail to the Orange, Virginia, address. No appearance was made by the defendants pursuant to these notices at the time and place designated for the motion to be made by the plaintiff.

3. The Court has given every reasonable opportunity to the defendants to appear and to cure their default under §8.01-319, and properly to notify the Court and the plaintiff of their residence and their mailing address so that this matter can proceed accordingly to law. The plaintiff has acted entirely reasonably and patiently in attempting to contact the defendants, without success, including several telephone calls made to a telephone number in Cabin John, Maryland, wherein the defendants were last known to be residing according to information given in another legal matter in this Court, Court File 1751.

4. The ends of justice require the court to grant the motion for summary and default judgment in this matter because of a long, vexatious, dilatory and unreasonable course of conduct by the defendants which has effectively prevented the plaintiff from being paid what the Court finds is justly due to it by the defendants.

5. The Court finds that the amounts sued for in this case are justly due to the plaintiff, as evidenced by two promissory notes executed by the defendants, and by a judgment as to which the plaintiff had a contractual right to one-third of any recovery as a fee. Both promissory notes bear interest, attorney's fees and payments of expenses by the defendants and the Court finds the judgment should be awarded as to those elements of the promissory notes, as well.

WHEREFORE, the Court grants judgment in the total amount of \$13,319.44 to Lowe and Gordon, Ltd., the plaintiff, against Elizabeth Y. Byrum and Barney L. Byrum, the defendants, as follows:

a. As to the December 31, 1974, promissory note, \$3,189.89 principal, \$1,248.36 interest to May 24, 1979,

and \$798.89 attorney's fees under the terms of the promissory note.

b. As to the September 23, 1974, promissory note, \$3,296.72 principal, \$1,134.87 interest through May 24, 1979, \$797.69 attorney's fees under the terms of the promissory note.

c. \$2,500.00 arising out of the representations of the defendants in Maryland in the personal injury action, with \$418.33 representing interest at 6% from August 23, 1976, to May 24, 1979.

d. The defendants have a credit of \$65.31 towards the foregoing.

ENTERED this 24th day of May 1979.

/s/ Herbert A. Pickford
Judge

SIXTEENTH JUDICIAL CIRCUIT

Herbert A. Pickford, Judge
City Courthouse
315 E. High Street
Charlottesville, Virginia 22901

December 9, 1980

J. Benjamin Dick, Esq.
421 Park Street
Charlottesville, Virginia 22901

Dear Mr. Dick:

Enclosed herewith is a copy of the memo I dictated February 6, 1979, in the matter of Lowe and Gordon, Ltd. v. Byrum. I am sending a copy to Mr. Redinger, along with a copy of your letter of December 9, 1980, wherein you made said request.

Very truly yours,

/s/ Herbert A. Pickford
Judge

Enclosure

Lowe & Gordon, Ltd. v. Byrum 2/6/79

Plaintiff's pleadings are based on a promissory note and a bond claiming approximately \$4,000.00 due. Subsequent correspondence in the file indicates the claim is in excess of \$8,000.00. All requests for continuance have been opposed by the plaintiff, and I by letter of January 4, 1979, told the Byrums they would have to be present today if they wished to oppose the action. They contacted Susan White this morning and she appeared in court to confess judgment; however, plaintiff Lowe stated he

did not want judgment on the original motion, but desired to amend its motion for judgment. I informed plaintiff Lowe that this matter has been dragged out long enough in this court with plaintiff insisting on trial and tht his motion to amend came too late especially since the Byrums who have come from some distance are not in a position to defend the amended motion today. Plaintiff nonsuited and immediately had new suit papers filed and served upon the defendants. I entered the order of the plaintiff requesting substitution of trustees under the defendants' deed of trust recorded in Louisa County which serves as a collateral for a portion of plaintiffs' claim. This was done pursuant to Code Section 26-48.

APPENDIX A
OPINIONS AND JUDGMENTS BELOW

PART II
FROM THE SUPREME COURT OF VIRGINIA
FROM THE CIRCUIT COURT
OF THE COUNTY OF LOUISA, VIRGINIA

SUPREME COURT OF VIRGINIA

No. 811900

Circuit Court No. C-2319

Filed June 17, 1983

BARNEY L. BYRUM et al., Appellants,

v.

GARY B. PATTERSON, Trustee, et al., Appellees

From the Circuit Court of Louisa County

Upon review of the record in this case and consideration of the argument submitted in support of an in opposition to the granting of an appeal, the court is of opinion there is not reversible error in the judgment complained of. Accordingly, the court refuses the petition for appeal. Code §8.01-675.

/s/ Allen L. Lucy
Clerk

In the Circuit Court of Louisa County, Virginia

Chancery No. 2319

Filed August 13, 1981

BARNEY L. BYRUM, et als., Complainants

v.

GARY B. PATTERSON, Trustee, et als., Defendants

DECREE

Came this matter to be heard upon the 24th day of July, 1981, upon the papers formerly read upon the complainants' motion to vacate and suspend the Court's final decree in this matter which was entered June 5, 1981; and upon the Court's decree of July 22, 1981, vacating and suspending the decree of June 5, until the Court shall have heard counsel for the defendant Patterson in regard to the complainants' motion and considered his position; and was argued by counsel, and counsel having been directed to prepare a draft decree for the Courts consideration, and the Court having considered said decree and given further consideration to the cause, upon said consideration, the Court does hereby continue the vacation and suspension of the Court's final order entered June 5, 1981, and vacated and suspended July 22, 1981, until such time as the Virginia Supreme Court does refuse to hear a writ of error addressed to it in the cause appealed from the Circuit Court of Charlottesville whereby John Lowe sued Barney L. Byrum, Jr., and Elizabeth Y. byrum and obtained a default judgment

or until such case is disposed of by the Virginia Supreme Court if appeal is granted or until such time as the case is disposed of by the Circuit Court of the City of Charlottesville if said appeal being granted results in the case being remanded to the Circuit court of Charlottesville.

And the Court doth Order counsel for the complainants' appeal from the final Order granting default judgment in said case from the Circuit Court of the City of Charlottesville;

And the Court doth note that the defendants object and except to the findings of the Court.

/s/ F. W. Harkrader, Jr.

Judge

CIRCUIT COURT OF LOUISA COUNTY, VIRGINIA

Chancery No. 2319

Filed July 22, 1981

**BARNEY L. BYRUM, JR. and
ELIZABETH Y. BYRUM** Plaintiffs

v.

GARY B. PATTERSON, TRUSTEE, et al.
Defendant

DECREE

CAME the plaintiffs on June 24, 1981 by counsel on a motion to vacate and suspend this Honorable Court's judgment decree of June 5, 1981 within 21 days as provided in Rule 1:1 of the rules of the Supreme Court of Virginia and on appearance of counsel on June 24, 1981, with the exception of defendant Patterson's counsel, Richard Arnold, Esquire, who was unable to attend and who reserved the right to be heard at a later date before the Court, the said motion was argued by counsel of record who appeared.

The Court having considered the motion solely on the grounds of paragraphs two and three of plaintiffs' motion to vacate and suspend the June 5th decree, does from the date of June 24, 1981 DECREE that the Court's decree of June 5, 1981 entered in this cause is VACATED and SUSPENDED indefinitely until such time the Court shall have heard counsel for defendant Patterson and shall rule otherwise upon this cause being further heard by counsel of record.

/s/ F. W. Harkrader, Jr.
Judge

CIRCUIT COURT FOR THE COUNTY OF LOUISA, VIRGINIA

No. 2319

Filed June 15, 1981

BARNEY L. BYRUM, JR., et. ux, Plaintiff

v.

GARY B. PATTERSON, Trustee, et al.,
Defendant

ORDER

Upon the pleadings and upon the evidence heard ore tenus, the Court does hereby make the following findings of fact:

1. The Order appointing Gary B. Patteson as substitute trustee was valid and not void.

2. Defendant Lowe & Gordon, Ltd. did not fail to make proper demands on the Plaintiffs as required by law for the payment of the bond, prior to instructing the Trustee to foreclose.

3. Defendant Lowe & Gordon, Ltd., breached no duty to the Plaintiffs to give them proper notice that they were in default in the payment of their bond.

4. Defendant Lowe & Gordon, Ltd. nor the Trustee failed to communicate with the Plaintiffs at a proper address, nor did they fail to furnish the Trustee with a proper address for notice in accordance with Virginia law.

5. The Defendant Trustee did not fail to give proper notice to Plaintiffs of the foreclosure, did not fail to use the last known address in accordance with statutory Virginia law, did not fail to make proper demand for payment, did not fail to permit the Plaintiffs to make timely redemption prior to foreclosure and did not fail to protect the Plaintiff's interest in accordance with his duties as prescribed by law.

6. The Byrums at no time exercised their right of redemption to Defendant Lowe & Gordon, Ltd., nor did they do so to the Trustee, nor did their employed counsel do so at the Byrum's direction to either Lowe & Gordon, Ltd., or the Trustee.

7. The price obtained for the property was not so deficient as to be considered inadequate at law.

8. There is insufficient evidence of improperly demanded payment of additional unsecured debts to invalidate this sale.

9. The Trustee did not fail in any duty to examine public records.

10. The Trustees made proper demand for payment in accordance with his obligations under the Law of Virginia;

11. The evidence discloses no improprieties on the part of the Trustee or Lowe & Gordon which would justify invalidation of the sale.

12. A transcript of the proceedings before the Court were prepared for the court and shall so constitute part of the record under Rule 5:9 of the Rules of the Supreme Court of Virginia.

13. Interlocutory orders against the Plaintiffs

were entered by the Court during the course of the proceedings to which the Plaintiffs excepted and which are hereby incorporated into this final decree by reference.

WHEREFORE, the Court finds that the forced sale was not improper and it appearing otherwise proper to do so, it is hereby

ORDERED that Plaintiffs' Bill of Complaint be and it hereby is dismissed and, upon the expiration of 60 days from date, the injunction shall be dissolved.

ENTERED this 5th day of June, 1981.

/s/ F.W. Harkrader, Jr.
Judge

F. Ward Harkrader, Jr., Judge
Sixteenth Judicial Circuit
Box 799
Louisa, Virginia 23093

February 18, 1981

Mr. J. Benjamin Dick
Attorney at Law
421 Park Street
Charlottesville, Virginia 22901

Mr. Richard W. Arnold
Attorney at Law
Post Office Box 276
Louisa, Virginia 23093

Mr. W. W. Whitlock
Attorney at Law
Post Office Box 128
Mineral, Virginia 23117

Mr. Craig T. Redinger
Lowe & Gordon Ltd.
Attorneys at Law
409 Park Street
Charlottesville, Virginia 22901

RE: Barney L. Byrum, Jr., and Elizabeth Byrum
v.

Gary B. Patterson, Trustee, et al

Gentlemen:

The Court has reviewed the evidence in the above captioned matter, in the light of the arguments submitted by counsel. This case has presented great difficulty to the Court because of the volume of evidence and also because of the sympathy raised in the mind of the

Court for the plaintiffs, related to their son's injury in the unfortunate motor vehicle accident which was disclosed, peripherally in the evidence. The Court is aware however, that sympathy and equity do not always occupy the same ground and it is the duty of the Court to rule in accordance with the principles of equity and not to be influenced by matters of sympathy which are inconsistent with equitable principles.

The Court makes the following findings of facts: 1. The Order appointing Gary B. Patterson as substitute Trustee was valid and not void; 2. The defendants Lowe & Gordon, Ltd., did not fail to make proper demands on the plaintiffs as required by law for the payment of said bond, prior to instructing the Trustee to foreclose; 3. The defendants Lowe & Gordon, Ltd., breeched no duty to the plaintiffs to give them proper notice that they were in default in the payment of their bond; 4. The defendant, Lowe & Gordon, Ltd., did not fail to communicate with the plaintiffs at a proper address, nor did they fail to furnish the Trustee with a proper address for notice in accordance with Virginia law; 5. The defendant Trustee, did not fail to give proper notice to plaintiffs of the foreclosure, did not fail to make proper demand for payment, did not fail to permit the plaintiffs to make timely redemption prior to foreclosure, did not fail to properly advertise the subject property upon foreclosure and did not fail to protect the plaintiff's interest in accordance with his duties as prescribed by law.

We do not find that Lowe & Gordon, Ltd., improperly refused bona-fide offers from the plaintiff to satisfy the debt secured by the Deed of Trust, or that they improperly caused the foreclosure action to proceed.

We further find that: 6. The Byrums at no time exercised their right of redemption; 7. The price obtained for the property, while not a good price, was not so deficient as to be considered inadequate at law; 8. We

find insufficient evidence of improperly demanded payment of additional unsecured debts to invalidate this sale; 9. We do not find that the Trustee failed in any duty to examine public records; 10. We find that the Trustee did make proper demand for payment in accordance with his obligations under the Law of Virginia; 11. The evidence discloses no improprieties on the part of the Trustee or Lowe & Gordon which would justify invalidation of the sale.

We make these findings, not without understanding, that there may have been misunderstanding and misconception in the minds of the plaintiffs, however it would be improper to transfer to the defendants an increased and inequitable burden of responsibility because of the possible misunderstanding or misconceptions of the plaintiffs for which the defendants were not at fault and not responsible.

Based upon the foregoing findings, the Court holds that the forced sale was not improper and the Bill of Complaint should be dismissed and the Injunction dissolved. However, the Order will provide for a stay of 60 days in order to enable the plaintiffs to perfect their appeal, should counsel indicate a desire to do so. I request that Mr. Redinger prepare the Order in accordance with this letter opinion and submit it to counsel for endorsement.

Sincerely,
F. W. HARKRADER, Jr., Judge

F. WARD HARKRADER, JR., JUDGE

Sixteenth Judicial Circuit

Box 799

Louisa, Virginia 23093

June 12, 1980

Ms. Annie Lee Congdon
Lowe & Gordon, Ltd.
Attorney at Law
409 Park Street
Charlottesville, Virginia 22901

Mr. R. W. Arnold
Attorney at Law
Post Office Box 276
Louisa, Virginia 23093

Mr. W.W. Whitlock
Attorney at Law
Post Office Box 128
Mineral, Virginia 23117

Mr. Gary Patterson
Attorney at Law
Post Office Box 56
Louisa, Virginia 23093

Mr. J. Benjamin Dick
Attorney at Law
421 Park Street
Charlottesville, Virginia 22901

RE: Lowe and Gordon, Ltd. v. Barney L. Byrum and
Elizabeth Byrum

Lady and Gentlemen:

I have reviewed the amended pleadings offered
by counsel for the Byrums' in the light of the arguments

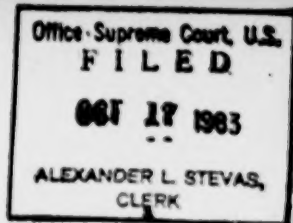
presented by all counsel today.

A review of the amended pleadings offered by counsel for the Byrums in light of the arguments of counsel persuades the Court that in many instances the proffered amended pleadings constitute a bill of particulars on the original bill of complaint. To the extent that this is not true and new and collateral issues are raised, we feel that they are not sufficiently germane to be permitted. To permit such amendments would substantially change the focus of the bill of complaint and would in effect institute a new cause of action, substantially prejudicing the rights of the defendants. Therefore, the motion for leave to amend the plaintiff's pleadings in this cause is denied as not being in furtherance of the ends of justice.

Sincerely,

F.W. HARKRADER, JR., JUDGE

83 - 416



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

ELIZABETH Y. BYRUM, et al.,

Petitioners

v.

LOWE & GORDON, LTD.,

Respondents

and

BARNEY L. BYRUM, et al.,

Petitioners

v.

GARY B. PATTERSON, LOWE & GORDON, LTD., et al.,

Respondents

BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

Counsel for Respondent:

J. Lloyd Snook, III
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901
804-296-8188

TABLE OF CONTENTS

TABLE OF AUTHORITIES	11
STATEMENT OF THE CASE	3
ARGUMENT I	12
ARGUMENT II	13
ARGUMENT III	17
ARGUMENT IV	20
CONCLUSION	24
CERTIFICATE	27

TABLE OF AUTHORITIES

<u>Barney L. Byrum, Jr. v. Lowe & Gordon, Ltd., No. 2319</u>	6, 9, 18
<u>Cousins v. Wigoda, 419 U.S. 477, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975)</u>	18
<u>Elizabeth Y. Byrum v. Lowe & Gordon, Ltd., 224 Va. —, 302 S.E.2d 46 (1983)</u>	<u>passim</u>
<u>Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1974, 72 L.Ed.2d 249 (1982)</u>	21
<u>Haynes v. James H. Carr, Inc. 427 F.2d 700 (4th Cir. 1970), cert. denied, 400 U.S. 942, 91 S.Ct. 238, 27 L.Ed.2d 245 (1970)</u>	15
<u>In re Brose, 51 U.S.L.W. 3898 (June 20, 1983)</u>	25
<u>Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972)</u>	16
<u>Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306 70 S.Ct. 652, 94 L.Ed. 865 (1950)</u>	20
<u>St. Louis & S.F.R. Co. v. Shepherd, 240 U.S. 240, 36 S.Ct. 274, 60 L.Ed. 622 (1916)</u>	17
<u>Wood v. Santa Barbara Chamber of Commerce, 699 F.2d 484 (9th Cir. 1983)</u>	25

Other Authorities

Va. Code Ann. §8.01-428

17

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

ELIZABETH Y. BYRUM, et al.,

Petitioners

v.

LOWE & GORDON, LTD.,

Respondents

and

BARNEY L. BYRUM, et al.,

Petitioners

v.

GARY B. PATTERSON, LOWE & GORDON, LTD., et al.,

Respondents

BRIEF IN OPPOSITION TO GRANT OF CERTIORARI

Respondent Lowe & Gordon, Ltd., now
Lowe, Gordon, Jacobs & Snook, Ltd., prays
that this Court deny the Petition for Writ of
Certiorari filed in the above-styled cases,
for the following reasons:

1. Petitioners have failed to comply with Rule 21.1(h), in that they have not stated the stage in the proceedings at which the federal questions on which review is sought were first raised.

2. The federal constitutional issues raised in the Petition for Writ of Certiorari were not raised in any lower court in either case, and have never been presented to any other forum.

3. The decisions of the state courts rest on adequate independent state procedural grounds.

4. Petitioners' argument, based upon their assertion that they were not afforded "notice reasonably calculated, under all of the circumstances . . . to afford them an opportunity to present their objections," ignores their admission in pleadings, found as fact by the Circuit Court of the City of Charlottesville and specifically reaffirmed by the Virginia Supreme Court,

that Petitioners had received a copy of the Motion for Judgment, had filed a response, had actual notice of the Motion for Default and Summary Judgment, and had simply refused to appear.

STATEMENT OF THE CASE

In April, 1974, Petitioners Barney L. Byrum, Jr. and Elizabeth Y. Byrum retained John C. Lowe, now president of Respondent Lowe & Gordon, Ltd., to represent them in two cases. To secure payment of legal fees, the Byrums executed promissory notes and a deed of trust on property owned by them in Louisa County, Virginia. When the Byrums refused to pay the legal fees due, Respondent brought suit. The Virginia Supreme Court described the litigation:

The Appellee, a professional corporation engaged in the practice of law, originally filed suit against the Byrums in June, 1978, for money it claimed was due it for legal services

rendered. The Byrums, representing themselves, responded to the suit, giving the court an address in Cabin John, Maryland.

In February, 1979, Lowe & Gordon nonsuited the first suit and personally served the Byrums in Charlottesville, Virginia,¹ with a new Motion for Judgment which increased the amount alleged to be due. The Byrums, again proceeding pro se, filed a timely response to this Motion for Judgment. However, this responsive pleading contained no address, in violation of Code §8.01-319.

In May, 1979, Lowe & Gordon filed a Motion for Default and Summary Judgment. It alleged that the Byrums had failed to keep the court and opposing counsel advised of an address where they could be reached and that this made prosecution of the case impossible. A copy of this Motion was sent certified mail to the Byrums' home in Virginia and other copies were served by the Secretary of the Commonwealth at two addresses in Maryland, including the Cabin John address the Byrums had previously given the court.

¹ By letter of August 24, 1983, Allen L. Lucy, Clerk of the Supreme Court of Virginia, notified counsel that the words "in Charlottesville, Virginia," should be added. This correction came too late for publication by West Publishing Company.

In May, 1979, the court held that the Byrums were in default and entered judgment for Lowe & Gordon. The court stated that the Byrums' failure to provide an address had prevented the case from proceeding in an orderly manner, that the Byrums had been "given every reasonable opportunity" to appear, and that Lowe & Gordon has "acted entirely reasonably and patiently in attempting to contact" the Byrums. It concluded the Byrums had engaged in "a long, vexatious, dilatory and unreasonable course of conduct."

As no action was taken to modify this judgment within 21 days, it became final. Rule 1:1. Moreover, no appeal was taken from the May judgment in accordance with our Rules of Court.

Elizabeth Y. Byrum v. Lowe & Gordon, Ltd.,

224 Va. ___, 302 S.E.2d 46, 47 (1983).

Lowe & Gordon proceeded to execute on the deed of trust, by properly beginning foreclosure proceedings in the Circuit Court for the County of Louisa. The Byrums' property was sold on November 19, 1979. The Byrums then filed a Bill of Complaint in the Circuit Court for the County of Louisa (Barney L. Byrum, Jr. v. Lowe & Gordon. Ltd. (No. 2319)), praying that the Trustee's Sale

be set aside. A temporary injunction was granted by the Circuit Court for Louisa County on December 13, 1979. The Byrums raised many objections to the Trustee's Sale, but the only objection that is even tangentially related to the issues raised in the Petition for Writ of Certiorari is their contention that the Trustee did not give adequate notice to them, and did not use the last known address for the Byrums, as required by Virginia law.

As that litigation progressed in Louisa County Circuit Court, the Byrums returned to Charlottesville Circuit Court and sought to reopen the May, 1979, judgment. The Virginia Supreme Court described the motion as follows:

In April, 1980, the Byrums, by counsel, filed a "Motion to Vacate Default Judgment Per §8.01-428."

The Byrums admitted that one of the Maryland addresses was the proper place to reach them and that notice of Lowe & Gordon's Motion for Default and Summary Judgment had been received, although a

family member failed to forward it to them in a timely fashion. The Byrums further admitted that Lowe & Gordon had attempted to contact them by telephone, but they had failed to provide an address because they felt they were being harassed. After a hearing on this Motion, the trial court refused to set aside the May, 1979, judgment, and the Byrums timely appealed from this order.

Elizabeth Y. Byrum v. Lowe & Gordon, Ltd., 302 S.E.2d at 47. The Virginia Supreme Court granted the Petition for Appeal.

As the appeal from the denial of the motion to reopen went forward, so did the litigation of the Louisa County suit. Eventually, the Louisa Circuit Court found that the Trustee "did not fail to give proper notice to plaintiffs of the foreclosure [and] did not fail to use the last known address in accordance with statutory Virginia law." (A-19). This order was entered on June 5, 1981.

On June 24, 1981, the Byrums asked the trial court to vacate and suspend the order dated June 5, 1981. Virginia law requires that an order vacating and

suspending a prior order be entered, not merely sought, within twenty-one days. The court took no action until July 22, 1981, well after the twenty-one day period allowed in Rule of Court 1:1. On August 13, 1981, the trial court sua sponte entered an order granting the Motion to Vacate and Suspend. On October 16, 1981, Petitioners filed a Motion asking that the Court rule that the order of July 22, 1981, was effective nunc pro tunc June 24, 1981. The court denied that motion, by order entered November 10, 1981, effective nunc pro tunc October 16, 1981.

The Byrums filed their Petition for Appeal on November 9, 1981, alleging many defects in the Trustee's Sale. Again, the only appeal issue relevant to their Petition was that the Trustee had failed to send notice to the Bryums' last known address. There was no hint of an allegation that the

statute, either facially or as applied, might violate due process of law.

Meanwhile, the injunction granted December 13, 1979, was continued in effect until the Virginia Supreme Court completed its consideration of the appeal from the judgment of the Circuit Court for the City of Charlottesville.

On April 29, 1983, the Supreme Court of Virginia upheld the Circuit Court for the City of Charlottesville in Elizabeth Y. Byrum v. Lowe & Gordon, Ltd. The Byrums filed a Petition for Rehearing, which was also denied by order dated June 17, 1983. Also on June 17, 1983, the Supreme Court of Virginia denied the Petition for Appeal filed in the Louisa County case, Barney L. Byrum, Jr. v. Lowe & Gordon, Ltd.

In their Petition for Rehearing, Petitioners unwittingly have provided further proof of their "long, vexatious, dilatory and unreasonable course of conduct." Respondent

notes for the Court's benefit that, on November 20, 1981, Petitioners filed yet another lawsuit against Respondent in the Circuit Court for the City of Charlottesville, alleging, inter alia, that Lowe & Gordon, Ltd., John C. Lowe, Gary Patterson (the Trustee), and W. W. Whitlock (counsel for the purchaser at the Trustee's Sale) conspired to defraud Petitioners. They sought actual damages of \$60,000.00 and punitive damages of \$10,000 000.00. Feeling aggrieved after the Circuit Court permitted Respondents an extension of time in which to file responsive pleadings, and therefore refused to grant the Motion for Summary Judgment filed by Petitioners, Petitioners took an interlocutory appeal to the Virginia Supreme Court, which was dismissed on December 27, 1982. Having thus been returned to the Circuit Court for the City of Charlottesville, the court required

amendments to the Motion for Judgment. The Amended Motion for Judgment, filed with the Petition for Rehearing (pp. 27-31), was dismissed by order dated July 11, 1983.

In their Statement of the Case, Petitioners make many allegations that are not relevant to the narrow issue presented — whether the Virginia statutes, on their face or as applied, denied Petitioners their rights to due process of law under the Fourteenth Amendment to the United States Constitution. Petitioners have repeatedly misstated the facts in their statement of the case, but, inasmuch as those misstatements are not material to the issue before this Court, no point-by-point refutation will be undertaken.

ARGUMENT I

PETITIONERS HAVE FAILED TO COMPLY WITH
RULE 21.1(h), IN THAT THEY HAVE NOT
STATED THE STAGE IN THE PROCEEDINGS AT
WHICH THE FEDERAL QUESTIONS ON WHICH
REVIEW IS SOUGHT WERE FIRST RAISED.

Rule 21.1(h) requires Petitioners
to specify, in their Statement of the Case,

The stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

The Statement of the Case does not disclose any mention of the Due Process Clause, the Fourteenth Amendment, or the United States Constitution. As is argued at some length in Argument II, below, Respondent's careful search of the records of

these cases shows only a passing reference to the Due Process Clause, the Fourteenth Amendment, or the United States Constitution in any stage of the proceedings, whether at the trial court or at the state appellate court level. On the chance that Petitioners in fact did raise a federal issue at some point of the proceedings, they have failed to comply with Rule 21.1(h).

ARGUMENT II

THE FEDERAL CONSTITUTIONAL ISSUES
RAISED BY PETITIONERS WERE NEVER
PRESENTED TO ANY LOWER STATE COURT, AND
THEREFORE CANNOT BE RAISED IN THIS
COURT.

None of the three "Questions Presented" was raised in any state court under any theory that invoked in any way the Due Process Clause of the Fourteenth Amendment, or any other provision of the United States Constitution.

A careful review of the Motion to

Vacate filed in April, 1980, the Petition for Appeal through the Virginia Supreme Court, and the Appellant's Brief in Elizabeth Y. Byrum v. Lowe & Gordon, Ltd. fails to disclose any mention of any federal question.

The Byrums made five assignments of error:

1. The trial court erred in not vacating the default judgment and allowing the Appellants to proceed to trial on the merits.
2. The lower court erred by granting a summary judgment contrary to Rule 3:18.
3. The lower court erred under Rule 3:17 by finding the Appellants in default.
4. The lower court erred in sustaining Lowe & Gordon, Ltd.'s alleged violation of §8.01-319 as a basis for granting a Motion for Summary and Default Judgment.
5. The lower court erred in allowing Lowe & Gordon, Ltd. to utilize §8.01-329 for notice of default and summary judgment to be entered when the Byrums were Virginia residents.

(sic) Appellant's Brief, at 8. The Table of Citations showed fifteen Virginia cases cited; no other authorities were mentioned.

In their reply brief, the only authorities cited were three Virginia cases.

Only in the Petition for Rehearing did the Byrums even refer to the Due Process Clause, to the United States Constitution, or to any federal authority. Petitioners made an argument captioned as follows:

The Lowe notice utilized under §8.01-329 of the Virginia Code was a legally wrong notice to seek a default summary judgment against Virginia residents.

(Petition for Rehearing, at 15). In the middle of this argument, the Byrums made their only reference to the United States Constitution:

Does this notice in the use of the long arm statute procedures violate the due process clause of the United States Constitution? It would so seem it does by Mr. Lowe's application of it, when the Byrums were not non-residents that it was used regardless and on all out of state addresses except for ones in Florida. Haynes v. James H. Carr, Inc., 427 F.2d 700 (4th Cir.1970), cert. denied, 400 U.S. 942, 91 S.Ct. 238, 27 L.Ed.2d 245 (1970).

Petition for Rehearing, at 16.

That is the only time in any of the proceedings in either case when the United States Constitution was mentioned.

First, of course, it is apparent that the Byrums have not attempted to present a constitutional question to a state court. The passing reference in the Petition for Rehearing cannot be adequate to present the issue. If a petitioner seeks to invoke the jurisdiction of this Court, it must be based upon a federal question properly presented and preserved in state courts. Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972).

If the petitioner intends to rely upon the passing reference to the Due Process Clause in the Petition for Rehearing, this Court has made it clear that the denial of the Petition for Rehearing by the state appellate court, without giving reasons or making clear that the federal question has been considered and overruled, will not be

adequate to invoke the appellate jurisdiction of this Court. St. Louis & S.F.R. Co. v. Shepherd, 240 U.S. 240, 36 S.Ct. 274, 60 L.Ed. 622 (1916).

ARGUMENT III

THE DECISIONS OF THE STATE COURTS REST ON ADEQUATE INDEPENDENT STATE PROCEDURAL GROUNDS.

The case of Elizabeth Y. Byrum v. Lowe & Gordon, Ltd., beginning in the Circuit Court for the City of Charlottesville, was decided on state procedural grounds. This must obviously be the case, since no federal issues were asserted. It cannot even be said that the issues asserted were due process issues clothed in state statutory language. The Virginia Supreme Court's decision was based upon its construction of Va. Code Ann. §8.01-428, and the Court concluded that, since the Byrums had allowed eleven months to

lapse between the entry of the order in May, 1979, and their motion in April, 1980, there was no procedural device by which they could reopen the case. Ultimately, the court concluded that the three ways in which orders may be changed or vacated more than twenty-one days after entry did not apply, as a matter of the construction of the state statute.

This is an independent state procedural ground. Where there is an adequate independent state ground for the decision of the Virginia Supreme Court, Petitioners cannot invoke the appellate jurisdiction of this Court. Cousins v. Wigoda, 419 U.S. 477, 487, 95 S.Ct. 541, 42 L.Ed.2d 595 (1975).

Likewise, the decision in Barney L. Byrum, Jr. v. Lowe & Gordon, Ltd., from the Louisa County Circuit Court, was certainly based upon state issues. The Petition for

Appeal cited no federal issues; again, the issues raised were not even arguably federal issues. The Virginia Supreme Court did not give any reasons for its decision to deny the Petition for Appeal; however, the denial could have been based upon Petitioners' failure to perfect the appeal within the three months allowed by rule, or the Court may have considered the substantive claims and rejected them on their merits. All of the substantive claims dealt with matters of state statute and procedure concerning the foreclosure sale itself. These are all clearly controlled by state law, and therefore provide an independent basis for decision.

In short, both of the cases being appealed here were brought up as entirely state-law cases. The Virginia Supreme Court decided them as state-law cases. Those decisions of state law are an independent basis for the decisions of the Virginia

Supreme Court, and those decisions are not reviewable by this Court.

ARGUMENT IV

PETITIONERS' ALLEGATIONS THAT THEY WERE DEPRIVED OF DUE PROCESS OF LAW ARE BASELESS.

Petitioners have alleged that they were deprived of due process of law when Respondents set the Charlottesville Circuit Court case for May 24, 1979, and received default and summary judgment at that time. Petitioners cite Mullane v. Central Hanover Bank and Trust Company, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950):

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Both Mullane and Greene v. Lindsey, 456 U.S. 444, 102 S.Ct. 1874, 72 L.Ed.2d 249 (1982) deal with the adequacy of notice to start legal action; they do not involve questions of the adequacy of notice once the litigation is underway. All that is required under the prior decisions of this Court is that there be a reasonable opportunity for a defendant to receive notice of the pendency of the action. In this case, the Byrums were personally served in the courtroom with the Motion for Judgment on which the judgment was ultimately rendered. They filed their answer. Respondents then attempted to set the case for trial, and were unable to do so, since the Byrums had not given an address on their pleadings and did not respond to mail sent to other known addresses.

In admissions given to the Circuit Court for the City of Charlottesville, the Byrums admitted that Lowe & Gordon had sent them a copy of their Motion for Default and

Summary Judgment in May, 1979. They admitted that the Motion was sent to one of the Maryland addresses that was a proper place to reach them. They admitted that the Notice of the Motion was in fact received by Petitioners' son, who then failed to forward the Notice to them. They further admitted that Lowe & Gordon had attempted to contact them by telephone, but that they had failed to give Lowe & Gordon an address, because they felt that they were being harassed. All of these admissions were found as fact by the Supreme Court of Virginia. This Court should not place itself in the position of reviewing the factual findings of the state courts. Where there has been actual notice, there can be no due process violation.

The Byrums have alleged that they did not receive notice of the Motion for Default and Summary Judgment until May 24, 1979, one day after the hearing was held.

They could have filed an immediate motion for reconsideration; Virginia's courts have typically been very solicitous of pro se litigants, provided they make some effort to comply with court procedures. The Byrums made no such effort.

The cases relied upon by Petitioners are cases in which the civil defendants did not even know that they were being sued. Here, where the Byrums knew that they were being sued but chose to ignore the proceedings, there has been no deprivation of due process. It does not matter whether the procedure for notice is "reasonably calculated to apprise interested parties of the pendency of the action," when the defendant clearly had personal service, effected face-to-face in the Charlottesville courthouse.

CONCLUSION

The Petitioners have been litigating this case in at least three separate actions in two different jurisdictions in Virginia over a period of five years. Having previously raised only issues of state law, they have now brought the matter to this Court, upon frivolous claims of federal questions. As was argued above, these claims are not properly before this Court. Even if they were, however, the claims lack merit.

Respondent Lowe & Gordon, Ltd., now Lowe, Gordon, Jacobs & Snook, Ltd., respectfully prays this Court to deny the Petition for Writ of Certiorari. Respondent also prays this Court to assess costs and attorney's fees against Petitioners, because this Petition for Writ of Certiorari is but one more step in the "long, vexatious, dilatory and unreasonable conduct" identified

by the Circuit Court for the City of Charlottesville back in May, 1979. The Petition for Writ of Certiorari is "frivolous, vexatious, and entirely unmeritorious." Wood v. Santa Barbara Chamber of Commerce, 699 F.2d 484, 485 (9th Cir. 1983); see In re Brose, 51 U.S.L.W. 3898 (June 20, 1983) (Burger, C.J., dissenting).

Supreme Court Rule 49.2 provides that "when an appeal or petition for writ of certiorari is frivolous, the court may award the appellee or the respondent appropriate damages." Among the circumstances leading to the award of damages is the "unsubstantial and frivolous" character of the federal question relied upon. Deming v. Carlisle Packing Company, 226 U.S. 102, 107 33 S.Ct. 80, 57 L.Ed. 140 (1912). Where the petition for writ of certiorari is sought only for delay, a penalty may be imposed. Texas and P. R. Co. v. Volk, 151 U.S. 73, 14 S.Ct. 239, 38 L.Ed. 78 (1894); Southern R. Co. v. Gadd,

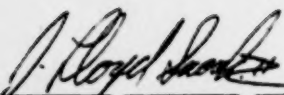
233 U.S. 572, 581, 34 S.Ct. 696, 58 L.Ed. 1099 (1914). In Wagner Electric Manufacturing Company v. Linden, 262 U.S. 226, 233, 43 S.Ct. 589, 67 L.Ed. 961 (1923), this Court awarded damages in a case, similar to the instant case, in which a bill in equity was brought to prevent enforcement of money judgment in a state court. This Court held that the appeal from the district court decision, dismissing for lack of jurisdiction, was frivolous. If this litigation is ever to end, this Court and other courts must be willing to tell those who bring frivolous actions that the further waste of the time of the courts and the parties will no longer be tolerated. These damages may also be taxed against counsel for Petitioners, who has represented them at virtually every step. 28 U.S.C. §1927 (1980).

Respondent respectfully prays this Court to put an end to this litigation, and, by awarding Respondents damages as provided by Rule 49.2, to make clear to Petitioners and their counsel that frivolous appeals will not be tolerated.

Respectfully submitted,

LOWE & GORDON, LTD.

By Counsel

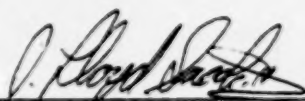


J. Lloyd Snook, III
Counsel for Respondent
Lowe, Gordon, Jacobs & Snook, Ltd.
409 Park Street
Charlottesville, Virginia 22901

CERTIFICATE

I, J. Lloyd Snook, III, having been duly sworn, state under oath that I am a member of the Bar of the Supreme Court of the United States, and that forty copies of the Brief in Opposition to Petition for Writ of

Certiorari were mailed, first-class, postage prepaid, addressed to the Clerk of the Supreme Court of the United States, on October 14, 1983, exactly thirty days after receipt of the Petitioner's Petition for Writ of Certiorari. Further, three copies have been mailed to J. Benjamin Dick, 421 Park Street, Charlottesville, Virginia, 22901, counsel for Petitioners.



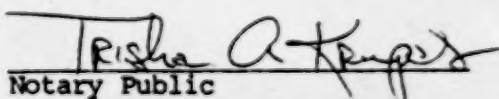
J. Lloyd Snook, III

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

AT LARGE, to-wit:

Sworn and subscribed before me by
J. Lloyd Snook, III, this 14th day of
October, 1983.



Notary Public

My commission expires:

June 10, 1986

NO. 83-416

FILED

NOV 3 1983

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

ELIZABETH Y. BYRUM et. al
Petitioners

v.

LOWE & GORDON, LTD.
Respondents

and

BARNEY L. BYRUM, et. al.
Petitioners

v.

GARY B. PATTERSON, LOWE & GORDON, LTD.
et. al.
Respondents

FROM APPEALS IN THE
SUPREME COURT OF VIRGINIA

REPLY BRIEF OF PETITIONERS ON LOWE AND GORDON'S
BRIEF IN OPPOSITION TO GRANT A WRIT OF CERTIORARI
OF COUNSEL:

LAW OFFICES OF J. BENJAMIN DICK &
JOHN MICHAEL CASSELL
421 Park Street
Charlottesville, VA 22901

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
REPLY BRIEF OF PETITIONERS ON BRIEF IN OPPOSITION	1-10b
a) Federal Issues Raised: In the Circuit Court of Charlottesville, Virginia	4-7
b) Federal Issue in the Supreme Court of Virginia	7-9
c) Federal Issues Raised: In the Circuit Court of Louisa County and Supreme Court of Virginia	9-10b
Certificate of Service	10b
Appendix A (Opinions and Judgments Below) From the Supreme Court of Virginia	A-1-A-2

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Brown v. Western Ry. of Alabama</u> 70 S.Ct. 105, 388 U.S. 294 (1949)	10b
<u>Davis v. Wechsler</u> 44 S.Ct. 13, 14, 263 U.S. 22, 24, (1923)	10a
<u>New York ex. rel. Bryant v. Zimmerman</u> 49 S.Ct. 61, 62 278 U.S. 63	3
<u>Reece v. Georgia</u> 76 S.Ct. 167, 169, 350 U.S. 85 (1955)	3
<u>Urie v. Thompson</u> 69 S. Ct. 1018, 1025-26, 377 U.S. 163, 171-173 (1949)	3

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

ELIZABETH Y. BYRUM, et. al.
Petitioners

v.

LOWE & GORDON, LTD.
Respondents

and

BARNEY L. BYRUM, et. al.
Petitioners

v.

GARY B. PATTERSON, LOWE & GORDON, LTD.
et. al.
Respondents

FROM APPEALS IN THE
SUPREME COURT OF VIRGINIA

REPLY BRIEF OF PETITIONERS ON
LOWE AND GORDON'S BRIEF IN
OPPOSITION TO GRANT A WRIT OF CERTIORARI

Note: All emphasis are the Petitioners unless otherwise noted. This is a corrected copy so requested by the Clerk of the Court to use Pica type and double spacing. As a result,

the Reply Brief had to be reduced in content.

In Lowe and Gordon's Brief in Opposition to Grant the [Writ] of Certiorari, it is remarkably and repeatedly stated by counsel in opposition that the federal constitutional issues raised in the Petition for Writ of Certiorari, the following recitals being a few examples of such emphatic language, that state repetitively that the Constitutional issues were not raised,

"...in any lower Court in either case and have never been presented to any other forum."

"A careful review of the Motion to Vacate filed in April 1980, the Petition for Appeal through the Virginia Supreme Court...[that] only in the Petition for Rehearing did the Byrums even refer to the Due Process Clause"

All through Lowe and Gordon's Brief in Opposition such statements are made and at page 24 thereof Lowe and Gordon states,

"...they have now brought the matter to this Court, upon frivolous claims of federal questions."

All of those statements are an utter disregard for the truth and complete misrepresentations to the Highest Court of America.

Whether there is such federal questions in the cases is a matter that the Supreme Court must decide itself. Reece v. Georgia 76 S. Ct. 167, 169, 350 U.S. 85 (1955). (See also Urie v. Thompson 69 S. Ct. 1018, 1025-26, 337 U.S. 163, 171-173. (1949).) It is further policy and law of the U.S. Supreme Court that "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time." New York ex. rel. Bryant v. Zimmerman 49 S. Ct. 61, 63; 278 U.S. 63. (1928). The Byrums present to this Court such exact stages that federal questions were raised, one being the very issue of due process that is placed before this Court and if the Byrums by inadver-

tence failed as alleged to comply with Rule 21(h) in their Petition, they submit the following in compliance.

I. IN THE CIRCUIT COURT OF
CHARLOTTESVILLE, VIRGINIA

a) In the Byrums' Motion to vacate

Default Judgment filed April 18, 1980:

1) Paragraph #6 - "That the defendants [the Byrums] claim their right to an evidentiary hearing on the merits..."

2) Paragraph #11 - "That notice to the Defendants by the plaintiff of the date for hearing on the Default Judgment was improper and not adequate..."

3) Paragraph #14 - "That the Defendants move the Court to vacate the Default Judgment pursuant to Section §8.01-428 of the Virginia Code ... and to file any other appropriate pleadings for an evidentiary hearing."

4) Paragraph #21 - "That the defendants have been denied their constitutional rights of due process and equal protection under the law by Plaintiff's actions, representations, and the like to gain a Default Judgment from the Court."

b) From Transcript of Hearing
on Above Motion, dated May 16, 1980, page
14:

1) Counsel for Byrums in Argument stated "I do not believe this is what our system of jurisprudence in Virginia stands for. I think these people are entitled to an evidentiary hearing and I believe §8.01-428(c) gives this Court that broad discretion..."

2) At page 20 of the said Transcript thereof, Counsel for Byrums stated:

"Well I don't believe we're here on the theory of fraud, Your Honor ... the service of process by the Secretary of the Commonwealth was sent back by the son of the Byrums, signed by him on the 25th of May and the order of this Court was entered on the 24th of May ... apparently they (the Court and Mrs. Lowe) never got any notice back when service was made and [to] whom it was made."

3) At page 22 of said Transcript:

"I think these people are entitled to an evidentiary hearing, as I stated before to the Court ... I don't think that Lowe and Gordon should fear having that sort of evidentiary hearing..."

4) At page 23 of said Transcript:

The Court: "...nothing we've discussed today falls within the purview of §8.01-428 and I don't see any way, in the opposition of the plaintiff to setting aside, the Court can grant your motion. I note your exceptions to my ruling ... I assume you except to my ruling. Byrums' counsel:" The grounds that I've argued is [are] our grounds." (Thus denying any constitutional claims made in the motion.)

C) From the June 17th 1980 Order of the Court.

"...nor does the Court find anything to merit vacating the default judgment...the Court further finds that there was no grounds for an independent action to attack or modify the judgment...the Defendant's Motion to Vacate the Default be and it is hereby denied..."

d) The Byrums' Motion to Vacate the June 17th 1980 Order.

Paragraph #3: "That the denial of the Court for the Defendants to have this cause tried on the merits...would constitute a manifest injustice upon them and violate their constitutional rights of due process and equal protection of the law..."

The lower State Court denied the motion and stated there was "no grounds." The federal issue was clearly raised, it was denied accordingly.

II. IN THE SUPREME COURT OF VIRGINIA

(Appealing the above)

a) From Byrums' Appellant Brief, to the Supreme Court of Virginia at page 14, under sub-title "Argument and Authority."

"The Byrums have directed this counsel to seek before this Honorable Court justice. They desire due process to be heard below by an evidentiary adversary proceeding on a creditor's disputed claim...Due process demands they should be heard before this creditor, an attorney, can take their life time savings invested in property away. The authority for that proposition is all too numerous to cite. The Virginia Constitution guarantees it as does the Federal Constitution."

b) At page 20 of the Byrums' Virginia Supreme Court Appellants' Brief:

"Due Process and justice would demand no less in this creditor - debtor situation but a full evidentiary hearing."

c) At page 24 of said State Court

Appellant's Brief

"The burden to prove notice is on his who alleges it and while the fact of notice may be inferred from circumstances as well as proven by direct evidence, the proof must be such as to affect the conscience of one whose rights are by the notice made to depend... Notice for a default and summary judgment was therefore improper for the lower court to rely upon for the basis of its Order of May 24, 1979."

d) From Byrums' Appellant's Reply Brief

in Said State Supreme Court.

"Due Process has never been served here when this sort of adjudication, entered even before the scheduled trial date of June 15, 1979 is created in this sort of manner. It violates the minimal tenet of fairness guaranteed by the Constitution...The simplest principles of justice and due process should readily afford the Byrums...an evidentiary hearing.

e) Byrums' Petition for Rehearing Before

the Virginia Supreme Court.

Page 3: "Certainly due process thereby would be denied in contradicting the rule set by our highest

Court for civil causes to affirm the default and summary judgment when the Byrums were not in default."

Page 15: "Due Process is truly lacking by all the circumstances considered and the record being clear that the Byrums were acting properly, complied with the rules..."

Page 22: "To sustain the judgment below under all these facts, circumstances, and the insurance of laws and procedures in Virginia shall deprive the Byrums of property or money with due process of law..."

III. IN THE SUPREME COURT OF VIRGINIA ON APPEAL FROM THE CIRCUIT COURT OF LOUISA COUNTY

a) From transcript dated July 25, 1981, the Court speaking, page 1:

"The difficulty that faces the Court is that we on motion of various counsel [John Lowe and his counsel] prohibited the introduction of any evidence concerning matters behind the decision of the Circuit Court of the City of Charlottesville which is a subject now being reviewed by the Supreme Court [Virginia] therefore this Court is in no position to rule as to whether or not that evidence would have influence on the Court's ruling in this case."

b) From Byrums Petition for Appeal
Filed with the Virginia Supreme Court on the
Louisa County Circuit Court Rulings:

Page 30: "The Court [Louisa Circuit Court] erred to exclude evidence relating to Lowe and Gordon's Attorney Client Contract and as it realted to a claimed default [Judgment]...The Byrums argue this exclsuion of evidence denys them due process...for these reasons the Byrums should have a review of the lower Court's decisions."

The Supreme Court of Virginia on affirm-
 ing the Circuit Court of Charlottesville's
 decision in the same instance ruled in denying
 a writ of review that "no reversible error"
 was found in the Circuit Court of Louisa
 County. Thus, the Supreme Court of Virginia
 has ruled on the federal issue of due process
 that was raised in both cases as the record
 clearly shows.

A sensbile and objective reader
 can see clearly that Respondents have mis-

represented that they "carefully reviewed" documents in their own hands to have ignored all of the above. And as to some of the specific representations made by the Respondents, for instance, that the "Byrums chose to ignore the proceedings and...there has been no deprivation of due process" (page 23 of Opposition Brief), such borders on a blatant misrepresentation to this Court and a callous disregard for the Byrums' rights.

Justice Holmes stated in Davis v. Wechsler 44 S. Ct. 13, 14 263 U.S. 22, 24 (1923), "whatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonable made, is not to be defeated under the name of local practice." The State Courts have denied any relief to the Byrums on the issue of due process and the record makes that self evident. Even a state procedural rule

asserted by Lowe and Gordon of general applicability that it interferes unduly with the presentation of federal questions. Brown v. Western Ry. of Alabama 70 S. Ct. 105, 388 U.S. 294. (1949)

The decisions are repugnant to the U.S. Constitution in their results and violate due process under the Fourteenth Amendment as guaranteed to these two U.S. Citizens. The Byrums preserved the federal issues, had them ruled upon and submit that action by this Highest Court of America is absolutely necessary for the Byrums to not be deprived of money and property without due process of law as guaranteed by the United States Constitution.

CERTIFICATE OF SERVICE

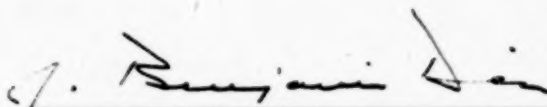
This is to certify that three corrected copies of this Reply Brief have been served on all parties required to be served, i.e., on Respondents by placing same in

an envelope and depositing it in the United States mail, regular postage prepaid, addressed to counsel of record as follows the 1st day of November, 1983.

John C. Lowe, Esquire
Counsel for Lowe and Gordon, Ltd.
409 Park Street
Charlottesville, VA 22901

Richard Arnold, Esquire
Counsel for Gary Patterson, Trustee
Post Office Box 276
Louisa, Virginia 23093

W. W. Whitlock, Esquire
Counsel for Bear Investment Co.
Post Office Box 128
Mineral, Virginia 23117



J. Benjamin Dick

APPENDIX A
OPINIONS AND JUDGMENTS BELOW
FROM THE SUPREME COURT OF VIRGINIA

SUPREME COURT OF VIRGINIA

No. 801458
Circuit Court No. L-1879

Filed October 21, 1983

ELIZABETH Y. BYRUM, et al., Appellants,

v.

LOWE & GORDON, LTD., Appellee.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellants, by counsel, praying that the court defer issuance of its mandate in this case until proceedings in the Supreme Court of the United States have been terminated, it is now ordered that the execution and enforcement of the judgment of this court rendered on April 29 and June 17, 1983, be, and the same is hereby, stayed until the final determination of the case by the Supreme Court of the United States.

/s/ Allen L. Lucy
Clerk

SUPREME COURT OF VIRGINIA

No. 811900
Circuit Court No. C-2319

Filed October 21, 1983

BARNEY L. BYRUM, et al.,
Appellants,

v.

GARY B. PATTERSON, Trustee, et al.,
Appellees.

ORDER STAYING EXECUTION OF JUDGMENT

Upon consideration of the application of the appellants, by counsel, praying that the court defer issuance of its mandate in this case until proceedings in the supreme Court of the United States have been terminated, it is now ordered that the execution and enforcement of the judgment of this court rendered on June 17, 1983, be, and the same is hereby, stayed until the final determination of the case by the Supreme Court of the United States.

/s/ Allen L. Lucy
Clerk